Supreme Court, U.S.
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No. 96-

In The

Supreme Court of the United States

October Term, 1996

UAP/GA AG CHEM., INC. and CONAGRA, INC.,

Petitioners,

v.

DENISE CHILDREE,

Respondent.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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88 pp

QUESTIONS PRESENTED

1. Whether the anti-retaliation provision of the False Claims Act covers an individual who was not investigating or bringing a False Claims Act case or assisting someone who was?

2. Whether a False Claims Act action must have been brought, threatened, or considered in order for the False Claims Act anti-retaliation provision to be invoked?

3. Whether there must be a nexus between a plaintiff claiming False Claims Act anti-retaliation protection and the False Claims Act other than the hypothetical possibility that plaintiff's alleged actions might have assisted someone bringing a False Claims Act, if someone had chosen to do so?

4. Whether Department of Agriculture administrative proceedings and investigations are covered by the anti-retaliation provision of the False Claims Act where no False Claims Act action had been brought or considered?

LIST OF PARTIES

The following party was plaintiff below and is a Respondent before this Court: Denise Childree

The following parties were Defendants below and are Petitioners before this Court: UAP GA/AG Chem., Inc.; ConAgra, Inc.[1]

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[1] The following is a list of the non-wholly owned subsidiaries and affiliates of Defendants-Petitioners:

Allexport S.A.
Altoms & Company Ltd.
AMP Joint Venture
Australia China Malt Pty. Ltd.
Australia Meat Holdings Pty. Ltd.
BFC Industrie S.A.
Bioter, S.A.
Bressanne de Crarcuterie S.A.
BTR (Bio-Technical Resources)
C.S.N. S.A.
C.S.P. SARL
CAGCAT, Inc.
Canadian Harvest Company USA
Canadian Harvest Process (1986) Ltd.
Cavib S.A.
Champace Co., Ltd.
ChampAgra Co. Ltd.
Chow Mexico
Commerce City Grain
Commodities Export Company-PTR
Compania Canaria de Piensos, S.A.
ConAgra (International) S.A.
ConAgra IBA, Inc.
ConAgra International (Cyprus) Limited
ConAgra Maple Leaf Milling, Inc.

LIST OF PARTIES – Continued

ConAgra Nissul, Inc.
ConAgra/Hubbard of South Dakota
Confish Inc.
Damatta-Produtos Alimentares, Lda
DCV Biologics
DCVision
Double B Trading Co., Inc.
DuCoa 1(FKA DuCon)
Ducoa Mexico S.A. DE C.V.
Ecological Chemical Products Company
EnPac
Estabelecimentos Isidoro M de Oilveira, S.A.
European American Industries
European Oat Millers Limited
FarmAgra
Food Producers Europe B.V.
Franz Albers Gmbh Hamburg
Garden State Bean Ltd Partnership
Georges Chanel S.A.
Greystone Partners
Hansa-Muhle Verwaltungsge – Gmbh
Hansa-Muhle Verwaltungsge – Gmbh & Co. Kg
Haskell County Farms
Hunt-Universal Robina Corp.
Idea Industrie S.A.
Independent Agriculture Limited
Items S.A.
Joaquim Pinho Dos Santos, Lda.
KBEC, Inc.
Keynes Bros.
Kurt A. Becher Unterstutzungskasse Gmbh
Lad Sales Company
Lamb-Weston/RDO Frozen
LaMulardiere
M-Cap Technologies International
M.F.P. Conagra/Ferruzzi Partnership
Maize-Distribution Center Weser Gmbh

LIST OF PARTIES – Continued

Maize-Distribution Center Weser Gmbh & Co. Kg
Maple Leaf Mills Inc. Gelazur S.A.
Marine Extract Ltd.
Meatworks of Australia
Mika Partnership
Monfort/AMH Ltd.
Mountain Lake Manufacturing
Nittoh Bion Kushiro
Northern Colorado Feed Limited Liability Company
NUFARM USA, Inc.
Nutribasics
Peas, Inc.
Pecom-Agra S.A.
Prairie Bean Company
Proteins Y Xantofilas, S.A.
Provican S.A.
Provsnor S.A.
Renew, Inc.
S&C Beef Processors Co., L.L.C.
S.D.S.R. S.A.
Sada P.A. Centro S.L.
Salaisons Traiteur Avenir Service SARL
Sankyo Trading Co., Ltd.
Sapropor, SARL
Societe Nouvelle Falor
Stolle Egg Biologics International
Superior Barge Lines, Inc.
Talsel Corporation Inc.
Tradpil
Trident Seafoods Corporation
UAP Chile
Usen Fisheries (1983) Limited
Vanson
Vitea
W&D Trading Philippines, Inc.
William M. Wheless, III Trustee

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INTRODUCTION

Petitioners UAP/GA AG CHEM, INC. ("UAP/GA") and ConAgra, Inc. ("ConAgra") respectfully pray that a writ of certiorari be issued to review the judgment and decision of the United States Court of Appeals for the Eleventh Circuit, filed August 28, 1996.

OPINIONS BELOW

The decision of the Court of Appeals for the Eleventh Circuit is published at 92 F.3d 1140 and is reprinted in the accompanying Appendix to this Petition at pages A-1-A-17. The decision of the United States District Court for the Northern District of Georgia (Hull, J.) is published at 892 F. Supp. 1554 and is reprinted in the Appendix to this Petition at pages A-18-A-57.

JURISDICTION

Jurisdiction of this court is invoked under 28 U.S.C. § 1254(1), which permits review by writ of certiorari before or after rendition of a judgment or decree by a United States Court of Appeals. The Eleventh Circuit's decision in this case was entered on August 28, 1996. Petitioners filed a Suggestion of Hearing *En Banc* and Petition for Rehearing, which was denied by the Eleventh Circuit on October 25, 1996. That order is reproduced in the Appendix to this Petition at pages A-58-A-60. On October 30, 1996, Petitioner moved for stay of the mandate, which was conditionally granted by the Eleventh

Circuit on November 6, 1996. That order is reproduced in the Appendix to this Petition at pages A-61-A-62. This Petition is timely filed.

STATUTES INVOLVED

The relevant provision of the False Claims Act, 31 U.S.C. § 3730(h), is set forth in the Appendix to this Petition at page A-63.

STATEMENT OF THE CASE

1. Course of Proceedings and Disposition Below

Plaintiff filed this lawsuit in May 1994. Plaintiff alleged that the termination of her employment by defendant UAP/GA AG Chem., Inc. ("UAP/GA") in July 1993 violated 31 U.S.C. § 3730(h), which prohibits retaliation against individuals because of their lawful acts "in furtherance of" a False Claims Act action. Plaintiff claimed that she was terminated after she testified at a U.S. Department of Agriculture hearing concerning farm subsidy applications of Varner-Bass Enterprises, one of UAP/GA's customers, and a number of individual farmers, where UAP/GA discovered for the first time that plaintiff in 1989 had copied confidential customer documents, removed them from UAP/GA's offices, and secreted them at her home. Neither defendant was a party to or was permitted to present any evidence or

participate in the proceedings before the U.S. Department of Agriculture.[1]

On March 6, 1995, defendants filed a motion for summary judgment, based on plaintiff's deposition and other depositions in the case, that plaintiff opposed.

Judge Hull issued an order on June 20, 1995 granting summary judgment in defendants' favor on plaintiff's federal claims under 31 U.S.C. § 3730(h). *Childree v. UAP/GA AG Chem, Inc.*, 892 F. Supp. 1554 (N.D. Ga. 1995) (Appendix, pp. A-18-A-57). Judge Hull ruled that "section 3730(h) was designed to protect those who come forward with evidence of fraud against the government. Section 3730(h) is not intended to protect an employee who merely refused to participate in [an alleged] scheme and kept documents in a box at home for four years until subpoenaed and required to testify and product them." 892 F. Supp. at 1565 (Appendix, p. A-40). The Court also found no "nexus between this [USDA] hearing and a[ny] potential False Claims Act action to be filed in the future." *Id.* Thus, Judge Hull concluded as a matter of law there was no reasonable nexus between any of plaintiff's alleged activities and to the furtherance of a False Claim Act action "filed or to be filed." *Id.*[2] (Appendix, pp. A-38-

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[1] Plaintiff also claimed that her termination violated the Ku Klux Klan Act of 1866, 42 U.S.C. § 1985(3), and intentionally inflicted emotional distress upon her.

[2] Judge Hull also ruled that plaintiff had stated no claim under the Ku Klux Klan Act, and, pursuant to 28 U.S.C. § 1367(c), Judge Hull declined to exercise supplemental jurisdiction over plaintiff's state-law claim. 892 F. Supp. at 1568, 1570.

A-41). Accordingly, judgment was entered for defendants on June 20, 1995. Plaintiff filed her notice of appeal from the judgment on July 10, 1995.

In its August 28, 1996 decision, 92 F.3d 1140 (11th Cir. 1996) (Appendix, pp. A-1-A-17), the Eleventh Circuit affirmed in part and reversed in part the order and judgment of the District Court. The Eleventh Circuit affirmed the District Court's grant of summary judgment on plaintiff's putative Ku Klux Klan Act claim, but reversed and remanded the District Court's grant of summary judgment on plaintiff's False Claims Act anti-retaliation claim and concomitant dismissal of plaintiff's state law claims. The Eleventh Circuit subsequently denied Petitioners' timely petition for rehearing and suggestion of rehearing *en banc*. (Appendix, pp. A-58-A-60).

2. Statement of Facts

The facts pertinent to this appeal are simple and undisputed. Plaintiff was employed by UAP/GA. In 1989, she answered some questions posed to her by a local official of the Agricultural Stabilization and Conservation Service ("ASCS") concerning certain invoices. At the ASCS official's request, plaintiff wrote out a statement concerning the subject of their discussion. Shortly thereafter, plaintiff surreptitiously photocopied certain invoices. She took the copies home with her and hid them in a box. The box sat forgotten in a closet in plaintiff's house unused for four years. Plaintiff admits that she never planned to do anything with these documents. Plaintiff thought or heard no more about the invoices until June 1993, when she was subpoenaed to testify and produce documents at an administrative hearing before

an ALJ in the Department of Agriculture. This hearing was an appeal by certain of UAP/GA's customers from the denial of their farming subsidy applications by the ASCS. Plaintiff appeared at the hearing, gave testimony along with two other UAP/GA employees who were subpoenaed, and produced documents, just as UAP/GA did in response to a separate subpoena. The ALJ found several of the farmers to be engaged in a scheme or device to evade subsidy limitations and, even though defendant was not a party and was not represented at the proceeding, included defendant in the finding. However, the ALJ's findings have now been vacated,[3] and there is no extant finding of fraud against any party.

The fact that plaintiff had secreted confidential customer financial records in her home, for which she provided no justification when asked, was revealed in connection with the hearing. This unjustified activity (plaintiff said she never intended to do anything with the documents) was the stated grounds for her termination.

The evidence is undisputed that plaintiff never intended to file a False Claims Act action; never considered filing a False Claims Act action; never heard of the False Claims Act; and never assisted the government or anyone else who filed, threatened to file, or even considered filing a False Claims Act case. It is this utter and complete lack of any connection to the False Claims Act

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[3] The fact that the ALJ's decision was vacated was disclosed by the United States in a submission to the Court of Appeals following oral argument. Defendants had not been aware of the course of those proceedings since they had not been party to the hearing before the ASCS.

that the District Court found dispositive in ruling that "[t]he language of Section 3730(h), even broadly construed, clearly provides that Plaintiff, at a minimum, must show some nexus between her conduct and the furtherance of a potential False Claims Act action." *Childree v. UAP/GA AG Chem, Inc.*, 892 F. Supp. 1554, 1563 (N.D. Ga. 1995). (Appendix, p. A-36).

The panel reversed summary judgment for the defendant as to plaintiff's Section 3730(h) claim. It concluded that plaintiff could sue for retaliation under Section 3730(h) of the False Claims Act because there was a "distinct possibility" that the government might have brought a False Claims Act action (although there was no evidence that it ever considered doing so), and that plaintiff's activities would have aided the government had it brought such a lawsuit. *Childree v. UAP/GA AG Chem, Inc.*, 92 F.3d 1140 (11th Cir. 1996) (Appendix, pp. A-12-A-13).

REASONS FOR GRANTING THE WRIT

1. The Writ Should Issue To Correct The Eleventh Circuit's Clear Error In Expanding Without Precedent The False Claims Anti-Retaliation Statute To Constructively Protect Plaintiffs Who Have No Palpable Nexus To The False Claims Act.

The Eleventh Circuit took a narrow statutory provision and converted it into a general federal whistleblower provision of major importance and virtually unlimited reach. The provision that the Eleventh Circuit was interpreting was designed to protect individuals pursuing a

specific, narrow, federal cause of action. The decision, if allowed to stand, would expand the law beyond anything contemplated or intended by Congress.

The anti-retaliation provision of the False Claims Act ("FCA") provides a cause of action for

> an employee who is discharged . . . because of lawful acts done by the employee on behalf of the employee or others in furtherance *of an action under this section,* including investigation for, initiation of, testimony for, or assistance in an action filed *or to be filed* under this section.

31 U.S.C. § 3730(h) (1988) (emphasis supplied) (Appendix, p. A-63). Thus, the FCA only protects activities by plaintiffs "in furtherance of an action under" the FCA, as indicated in the statutory language chosen by Congress. *Id.*; S. Rep. No. 345, 99th Cong., 2d Sess. 34, *reprinted in* 1986 U.S.C.C.A.N. 5266, 5299. However, the panel's interpretation of this language is so broad as to nullify this limitation. In applying an analysis that it described as the "distinct possibility test,"[4] the panel held that there need be no nexus between a plaintiff and an *actual* False Claims Act case for the plaintiff to bring a retaliation claim. 92 F.3d at 1146 (Appendix, pp. A-12-A-14). It found

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[4] The panel decision borrows this phrase from *Neal v. Honeywell, Inc.*, 33 F.3d 860, 864 (7th Cir. 1994). But *Neal* did not purport to enunciate that phrase as a test. *Neal* simply held that where the plaintiff and the U.S. Army were simultaneously investigating possible contractor fraud in preparation to bring an FCA suit, FCA litigation remained "a real possibility" despite the fact that the contractor settled with the government before any *qui tam* suit could actually be filed. 33 F.3d at 861, 864-65. *See* note 5 *infra*.

that the plaintiff does not have to bring an FCA action, intend to bring such an action, know of the existence of the FCA, or be motivated by its antiretaliation provisions. *Id. Nor, the panel found, does any other person or entity have to bring, threaten, or consider an FCA action. Id.* There was no evidence in this case that anyone did so, and there was no finding by the Court of Appeals that anyone did so. *Id.* Indeed, the undisputed evidence was that the first time in this entire matter that the FCA was even in the picture was when plaintiff filed this retaliation action. *See id.*; 892 F. Supp. at 1562, 1564-65 (Appendix, pp. A-31, A-36-A-40).

In reversing the District Court, the panel indicated that the FCA was satisfied if the plaintiff could go back to past events and construct a hypothetical under which an FCA action *could* have been brought, and activity of the plaintiff *could* have aided the hypothetical lawsuit, *if* it had been brought. 92 F.3d at 1146 (Appendix, pp. A-13-A-14). The panel decision declined to require that someone whom plaintiff actually assisted have at least considered bringing a False Claims Act case in order for the anti-retaliation provisions of the FCA to apply. *Id.*[5]

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[5] Ironically, the panel decision acknowledges that "[w]e are bound to follow the plain language of a statute." 92 F.3d at 1146 (Appendix, p. A-12). However the panel decision ignores the "plain language" of Section 3730(h). Instead, the entire analysis appears to be based on a misapplication of an interpretation placed on the statute by a panel of another Circuit in *Neal v. Honeywell, Inc.*, 33 F.3d 860, 864 (7th Cir. 1994) – not on a proper analysis of the application of the "in furtherance of an action filed or to be filed" language in Section 3730(h) itself. Rather than deal with the language of the statute, the panel here adopted language from the *Neal* decision, employed in

The panel's interpretation of the statute deviates from the FCA's unambiguous requirement that, to be

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explaining the holding in *Neal*, that stretched the statute to its limits.

The *Neal* decision recognized that Ms. Neal had a Section 3730(h) cause of action because FCA litigation "was a distinct possibility" in that case. The panel here picked up that phrase from *Neal* and substituted it for the language of the statute in its analysis. 92 F.3d at 1145, 1146 (Appendix, pp. A-11, A-13, A-14). The panel decision even dubbed it "the distinct possibility test" and engaged in "an application of the distinct possibility test to the facts of this case." *Id.* (Appendix, p. A-13). In doing so, the panel fundamentally misconstrued the holding of *Neal* and took the rationale of *Neal* completely out of context.

Neal did not involve retrospective speculation about what Ms. Neal or the government could have done if they had thought of it. Indeed, it was clear in *Neal* that both Ms. Neal and the government were simultaneously planning FCA litigation against Honeywell. The issue tackled by the *Neal* panel was whether those plans had to come to fruition in order for Ms. Neal to fall within the protection of Section 3730(h). *Neal* simply held that Honeywell's decision to settle the looming FCA claims before they could be litigated against Honeywell did not retrospectively deprive Ms. Neal of protection. *The FCA was clearly in the picture because both Ms. Neal and the government had investigated Honeywell and were preparing FCA litigation against Honeywell. Neal* did not, however, sanction speculation in hindsight about what the government might have done about the FCA if it had thought of it. Quite the contrary, the "distinct possibility" in Neal was "a real possibility" that FCA litigation would be commenced. That "real possibility" of FCA litigation was evidenced by the "two guilty pleas and a hefty settlement" that resulted from "her own investigation and report[ing] her findings through corporate channels, leading to two additional investigations: one by Honeywell and a second by the Army." 33 F.3d at 864, 865.

The panel here took *Neal's* holding that an employer's ultimate settlement of FCA claims before they can be filed does

protected, activities must be "in furtherance of an action under this section." 31 U.S.C. § 3730(h); *United States v. Century Healthcare Corp.*, 90 F.3d 1514, 1522 (10th Cir. 1996); *see, e.g., Philon v. Martin Marietta Corp.*, 60 F.3d 995, 998 (2d Cir. 1995) (the "overall intent in amending the *qui tam* section of the False Claims Act [was] to encourage more private enforcement suits") (citation omitted). No case has ever purported to extend the anti-retaliation

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not retrospectively remove Section 3730(h) protection and turned it on its head: you are protected, the panel decision says, if you can retrospectively construct a hypothetical set of circumstances under which the government might have filed an FCA action if some government official had thought of it. Although conceding that "it is obvious that" an FCA action by plaintiff "was never a distinct possibility," the panel speculated that "the government's filing a § 3730(a) action was a distinct possibility." 92 F.3d at 1146 (Appendix, pp. A-13-A-14). Yet nothing in the record here remotely suggests that the government, or anyone else, ever considered the possibility of filing an FCA action against defendants or their farming customers. To the contrary, the facts recited in the panel's opinion establish exactly the opposite: *that this case arose in the context of appeals before the Department of Agriculture brought by the farming customers (not plaintiff or the government) to challenge the denial of farm subsidy applications*. 92 F.3d at 1142-43 (Appendix, pp. A-3-A-5). In other words, this matter was already in the Department's administrative process – not the False Claims Act arena – "at the time," as the panel puts it, "Childree rendered her assistance." 92 F.3d at 1146 (Appendix, p. A-13). There is no evidence here that the government ever even considered pursing FCA litigation involving defendants or their farming customers. Indeed, the facts cited by the panel provide no basis whatsoever for drawing any reasonable inference that the government ever, at any time, contemplated doing so. In the absence of such a basis, the panel's "distinct possibility test" is nothing more than an exercise in speculation.

provision of Section 3730(h) to protect an individual who, like plaintiff, had absolutely no meaningful nexus to the FCA, through herself or anyone else. Indeed, the cases have uniformly limited causes of action for retaliation under the FCA only to those situations where there was an actual, palpable connection between the allegedly protected conduct and the FCA itself. Where, as here, there was no such nexus, Section 3730(h) has been held inapplicable, no matter how noble or public-minded the conduct at issue was alleged to be. *E.g., Century,* 90 F.3d at 1522; *Robertson v. Bell Helicopter Textron, Inc.,* 32 F.3d 948, 950, 951-52 (5th Cir. 1994) (Section 3730(h) only protects actions taken "in an effort to bring, or to help the government to bring," an FCA suit), *cert. denied,* 115 S. Ct. 1110 (1995); *X Corp. v. Doe,* 816 F. Supp. 1086, 1095-96 (E.D. Va. 1993); *Hardin v. Dupont Scandinavia (ARA-Jet),* 731 F. Supp. 1202, 1205 (S.D.N.Y. 1990).

The effect of the panel's ruling is to create a general federal whistleblower statute that covers a multitude of situations with no real connection to the FCA. Almost any claim of whistleblower activity can somehow be associated in retrospect with the loss of funds, and thus potentially to the False Claims Act. The "whistleblower" protection is virtually without limits if the plaintiff need do no more than hypothesize a False Claims Act lawsuit that never occurred nor even was contemplated by anybody, and claim that some activity in which she engaged would, hypothetically, have aided the hypothetical FCA lawsuit if it had ever existed outside of the ingenuity of counsel. However much it may be argued that some whistleblower protection act is in the public interest, Congress has clearly resisted adopting it. Indeed,

contrary to the panel's view of the FCA's purpose "to encourage employees to bring information to the government," 92 F.3d at 1145 (Appendix, p. A-10), the legislative history of the 1986 amendment that added Section 3730(h) to the FCA states that the "overall intent in amending the *qui tam* section of the False Claims Act is to encourage more private enforcement suits." S. Rep. No. 345, 99th Cong., 2d Sess. 23-24, *reprinted in* 1986 U.S.C.A.A.N. 5266, 5288-89.

Thus, the panel's opinion in effect creates what Congress has declined to create. In fact, Section 3730(h) is like a multitude of other federal statutes Congress enacted to protect a defined range of specific conduct by private citizens who cooperate in enforcement of certain Federal laws. *See, e.g.*, 42 U.S.C. § 5851(a) (Energy Reorganization Act); 42 U.S.C. § 9610(a) (CERCLA); 42 U.S.C. § 6971 (Conservation And Recovery Act); 15 U.S.C. § 2622 (Toxic Substances Control Act); 45 U.S.C. § 441(a) (former provision of Federal Railroad Safety Act); 30 U.S.C. § 820(b)(1) (Mine Safety Act). The existence of so many individual statutes tailored to specific reporting under certain federal statutes strongly indicates that there is no *general* federal whistleblower protection and that none of these specific provisions should be interpreted too broadly to encompass activities outside of their statutory framework.[6]

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[6] Further, the panel's opinion effectively amended the statutes governing the administrative procedures of the Department of Agriculture. All of the activities alleged here – plaintiff's discussions with a Department of Agriculture official and her participation in a Department of Agriculture hearing – were part of that Department's administrative procedures. *See*

2. The Eleventh Circuit's Overbroad Interpretation Of The Statute Conflicts With The Well-Reasoned Interpretation Of The Statute By The United States Court Of Appeals For The Tenth Circuit And Many Other Federal Courts That Have Construed The Statute.

No case has ever purported to extend Section 3730(h) to protect an individual who, like plaintiff, had absolutely no nexus to the FCA, through herself or anyone else. Indeed, the cases have uniformly limited causes of action for retaliation under the FCA only to those instances where there was an actual, palpable connection between the allegedly protected conduct and the FCA itself. Where, as here, there was no such nexus, Section 3730(h) has been held inapplicable, regardless of the perceived desirability or asserted social importance of the conduct at issue. *E.g., Robertson v. Bell Helicopter Textron, Inc.*, 32 F.3d 948, 951-52 (5th Cir. 1994) (Section 3730(h) only protects actions taken "in an effort to bring, or to help the government bring," an FCA suit), *cert. denied*, 115 S. Ct. 1110 (1995); *X Corp. v. Doe*, 816 F. Supp. 1086, 1095-96 (E.D. Va. 1993); *Hardin v. Dupont Scandinavia (ARA-Jet)*, 731 F. Supp. 1202, 1205 (S.D.N.Y. 1990).

Indeed, the panel decision remains out on a limb by itself. Although the panel decision states that "only one other court of appeals has addressed § 3730(h)," 92 F.3d at 1145 n.6 (Appendix, p. A-12 n.6), both the Ninth and

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92 F.3d at 1143 (Appendix, pp. A-4-A-5). By holding that these activities were subject to the FCA, the decision adds new anti-retaliation procedures to the laws controlling the Agriculture Department, where Congress has declined to do so.

Tenth Circuits have recently issued decisions construing Section 3730(h). In each case, the courts emphasized that "Section 3730(h) only protects employees who have acted 'in furtherance of an action' under the FCA," *United States v. Anton*, 91 F.3d 1261 (9th Cir. 1996), which means that "a plaintiff must be investigating fraud in order to bring a[n] FCA suit to be protected under § 3730(h)," *id.*, or taking action " 'in an effort to bring, or to help the government bring, a False Claims Act suit.' " *United States v. Century Healthcare Corp.*, 90 F.3d 1514 (10th Cir. 1996). In both cases, the appellate courts dismissed Section 3730(h) claims for failure to establish a real nexus to the FCA. Neither court engaged in retrospective speculation about whether the government *could* have brought FCA actions *if* any of its officials had thought of it.

For example, the panel's approach is contrary to the decision of the United States Court of Appeals for the Tenth Circuit in *United States v. Century Healthcare Corp.*, 90 F.3d 1514 (10th Cir. 1996).[7] In *Century*, an internal whistleblower complained that company activity was illegal, was fired for doing so, and brought an FCA claim based on the illegal activities. 90 F.3d 1516-17. Plaintiff also brought a retaliation claim for her discharge. *Id.* With regard to the retaliation claim, the Tenth Circuit held that "plaintiff has the burden of pleading facts which would demonstrate that defendants had been put on notice that plaintiff was either taking action in furtherance of a private *qui tam* action or assisting in an FCA action brought

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[7] The decision was published after the oral argument in this case before the Eleventh Circuit.

by the government." 90 F.3d at 1522. The Tenth Circuit ruled that she had failed to do so. *Id.* at 1522-23.

The Tenth Circuit's holding that the defendants must receive such notice is inconsistent with the panel's decision in this case that there need be no actual FCA action brought, threatened, planned, or even contemplated. If, as here, no one is even considering bringing an FCA action, then defendant could hardly be put on notice that "plaintiff was either taking action in furtherance of a private *qui tam* action or assisting an FCA action brought by the government." 90 F.3d at 1522. The Tenth Circuit's ruling is also inconsistent with the holding here that "a distinct possibility test" is appropriate. In *Century*, the plaintiff repeatedly warned the defendant of the illegality of its activities. 90 F.3d at 1517, 1522-23. Thus, an FCA action was far more of a "distinct possibility" in that case than in the present one (where no such action has been filed). Indeed, the FCA action was not only a distinct possibility in *Century*, the plaintiff there actually filed her own *qui tam* suit. *Id.* at 1516-17. Yet the retaliation claim was dismissed because merely warning that the conduct was illegal, without threatening to bring an FCA action, did not put the defendants on sufficient notice that an FCA action could be brought.[8] *Id.* at 1522-23.

In sum, the Eleventh Circuit's decision has given us a new and judicially "improved" version of Section

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[8] The Tenth Circuit did *not* hold that an action must actually be filed. 90 F.3d at 1522. Such a holding is not necessary to uphold petitioners' position here.

3730(h). This version would afford protection to any terminated employee who, in retrospect, claims that something she said or did was somehow related to government monies and, had her words or deeds been shared with the government, might possibly have induced it to pursue an FCA claim against someone. In effect, the Eleventh Circuit *sua sponte* transformed Section 3730(h) to cover a multitude of situations that in fact have no *real* connection whatsoever to the FCA.

CONCLUSION

The writ should issue to resolve whether putative plaintiffs invoking protection of Section 3730(h) of the False Claims Act must, as all the Federal Courts but one who have construed the statute have ruled, have participated in an activity in furtherance of a False Claims Act claim; or whether anybody who claims to have engaged in any conduct self-styled as related to government monies may invoke protection after the fact without a scintilla of actual connection to the False Claims Act, as the Eleventh Circuit ruled here in purporting to create an unprecedented "possibilities" test. The extraordinary implications of the Eleventh Circuit's gloss on a statute, never before construed by this Court, that contradicts the immense weight of federal authority, including the Tenth Circuit's contemporaneously issued opinion in *United States v. Century Healthcare Corp.*, 90 F.3d 1514 (10th Cir. 1996), demand that this Court exercise its supervisory

powers and issue the writ to review and resolve this conflict.

Respectfully submitted,

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Denise CHILDREE, Plaintiff-Appellant,

v.

UAP/GA AG CHEM, INC., et al., Defendants-Appellees.

No. 95-8871.

United States Court of Appeals, Eleventh Circuit.

Aug. 28, 1996.

Steven Keith Leibel, David C. Ates, Steven K. Leibel & Associates, Atlanta, GA, Julian Webb, Donaldsonville, GA, for appellant.

Thomas H. Christopher, Jeffrey Alan VanDetta, Kilpatrick & Cody, Atlanta, GA, Thomas L. Dueber, Greeley, CO, for appellees.

Bruce Forrest, Douglas N. Letter, U.S. Dept. of Justice, Appellate Staff, Washington, D.C., for amicus curiae U.S.

Appeal from the United States District Court for the Northern District of Georgia.

Before CARNES, Circuit Judge, and FAY and GIBSON* Senior Circuit Judges.

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* Honorable John R. Gibson, Senior U.S. Circuit Judge for the Eighth Circuit, sitting by designation.

CARNES, Circuit Judge:

After more than five years with one of the defendants, UAP/GA AG CHEM., INC. ("UAP/GA"),[1] the plaintiff, Denise Childree, was terminated from her employment. Her termination occurred approximately one week after she testified in an administrative hearing before the Department of Agriculture (the "DOA"), about a suspected fraudulent billing scheme allegedly used by a customer of UAP/GA, Varner Bass Enterprises, Inc., to bilk money out of the United States government. Although Varner Bass, and not UAP/GA, was a party to the hearing, Childree's testimony was unfavorable to UAP/GA, also. Her testimony allegedly exposed UAP/GA's assistance to Varner Bass in its fraudulent scheme against the government.

The question on appeal is whether the district court correctly granted summary judgment to the defendants, holding that Childree's termination did not violate the whistleblower protection provision of the False Claims Act of 1986, 31 U.S.C. § 3730(h), or violate the Ku Klux Klan Act of 1871, 42 U.S.C. § 1985(3). For the reasons stated below, we reverse the district court's grant of summary judgment to the defendants on the whistleblower protection claim, and affirm the district court's grant of summary judgment to the defendants on the Klan Act claim.

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[1] The other defendant is ConAgra, UAP's parent company. UAP/GA is the Georgia branch of UAP.

I. FACTS AND PROCEDURAL HISTORY

Because we are reviewing the district court's grant of summary judgment in favor of the defendants, we view the evidence in the light most favorable to the plaintiff. *See, e.g., Flores v. Carnival Cruise Lines*, 47 F.3d 1120, 1122 (11th Cir.1995). Viewed in that light, the facts are as follows.

While employed by UAP/GA, Childree's job responsibilities included billing customers. UAP/GA sells fertilizer, seeds, and other related products to farmers. In June 1989, a representative for one of UAP/AG's primary customers, Varner Bass, requested that Childree re-bill certain invoices. The invoices had been billed to Varner Bass, and its representative requested that they be re-billed to a number of other individuals, all of whom allegedly leased land from Varner Bass, but whom Childree believed were merely subsidiary fronts for Varner Bass. Childree refused to comply, because she believed the re-billing request was part of an attempt to defraud the United States government. Varner Bass, and other farming businesses, receive reimbursement up to a maximum of $50,000-per-claim from the DOA's Agricultural Stabilization and Conservation Service ("ASCS") for monies expended in connection with various farming activities. Childree believed that Varner Bass's request for the re-billings was an attempt to use subsidiary fronts to evade the $50,000-per-claim reimbursement ceiling and thereby illegally obtain excessive payments from the government.

Childree raised her concerns about the re-billing request to one of UAP/AG's credit managers. He replied,

"Who is to say you wouldn't do it if given the opportunity." Childree next raised her suspicions to another UAP/AG credit manager, who informed her, in essence, that the less she knew, the better. Childree then reported her concerns to two of her supervisors. One of them directed her to process the re-billings as they had been submitted, and the other one, Darryl Mathis, apparently said nothing. Despite her supervisor's directive, Childree refused to process the re-billings; the re-billing forms sat on Childree's desk until that supervisor processed them himself.

One month later, in July 1989, Eloise Taylor, a local ASCS official, visited UAP/GA's office, and met with Childree and Mathis. Taylor requested verification of the validity of the re-billings that had been submitted to the ASCS on behalf of Varner Bass. Mathis told Childree to tell the truth. Childree informed Taylor that she could not verify the validity of those documents. Taylor then asked Childree to tell her what was going on, and Childree did so. Shortly after that meeting, Childree sent Taylor a written statement, which repeated what Childree had told her in person. After Taylor's visit, Childree made copies of the completed re-billing forms, which were still on the counter waiting to be filed, and took those copies home. Mathis was aware that Childree was making copies of the documents, and he told her to do whatever she had to do to protect herself. Childree says that she had not planned on using the copies, but wanted to keep them because they were represented as coming from her office.

Four years later, in June 1993, the DOA subpoenaed Childree to appear at a hearing before its National

Appeals Division (the "NAD") concerning the alleged fraudulent schemes of Varner Bass and other farming businesses in conjunction with the ASCS program. The subpoena required that Childree bring to the hearing all documents, personal notes, and written statements relating to the 1989 farming operations of Varner Bass. Childree was reluctant to testify at the hearing, because she feared she would lose her job if she did. Nevertheless, on June 24, 1993, under subpoena, she did testify at the hearing about the Varner Bass re-billings, and about her attempts to report to her superiors what she believed to be fraudulent activities in connection with those re-billings. She also turned over her copies of the Varner Bass re-billing forms. Gary Callahan, an officer of UAP,[2] attended the DOA hearing. According to Childree's deposition testimony, during a break in the hearing, Callahan went into the room where some of the other witnesses were sequestered and threw a yellow pad on the table. According to Childree, he said that "these were the issues, that [Childree] had just blown the whole thing, and [that she] didn't know how to handle business."

In August 1994, the NAD issued its findings, in which it concluded that Varner Bass, along with several other farming operations, had engaged in a scheme designed to evade ASCS payment limitations. Although UAP/GA was not a party to the NAD hearing, the NAD stated in its findings that UAP/GA had assisted in and participated in the scheme.

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[2] See *supra* n. 1.

On July 1, 1993, UAP/GA suspended Childree from her employment without pay, and on July 9, 1993, terminated her employment. UAP/GA stated that Childree was being terminated for removing confidential customer files from the company's premises without authorization, i.e., the copies of the re-billing forms that she had taken home in 1989 and produced at the 1993 hearing.

Childree concedes that before her termination, she never considered bringing a False Claims Act action with regard to the Varner Bass re-billings, and that in fact, she had never heard of that Act. She also concedes that the statute of limitations for bringing such a *qui tam* action has now run. *See* 31 U.S.C.A. § 3730(b) (West Supp.1996). In addition, the government has never brought, threatened to bring, or even considered bringing a False Claims Act action against UAP/GA or its parent company, ConAgra, for their role in Varner Bass's fraudulent scheme.

In May 1994, Childree filed this suit against UAP/GA and ConAgra claiming that: (1) the defendants had violated the whistleblower protection provision of the False Claims Act of 1986, 31 U.S.C. § 3730(h), by terminating her employment in retaliation for her actions with regard to the Varner Bass re-billings; (2) the defendants had violated the Ku Klux Klan Act of 1871, 42 U.S.C. § 1985(3), by conspiring to deprive Childree of her right to testify; and (3) the defendants had intentionally inflicted emotional distress on Childree in violation of Georgia state law.

In March 1995, the district court granted summary judgment in favor of the defendants on the whistleblower

protection claim and the Klan Act claim.[3] Having dismissed all of the federal claims, the court also dismissed without prejudice the state law claim.[4] Childree appeals.

II. DISCUSSION

A. THE WHISTLEBLOWER PROTECTION CLAIM, § 3730(h)

The district court granted summary judgment to the defendants on the whistleblower protection claim, because it concluded that Childree's conduct was not covered by the whistleblower protection provision of the

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[3] The court also denied as moot ConAgra's earlier motion for summary judgment, in which ConAgra argued that even if UAP/GA was liable, ConAgra was not liable because it did not employ Childree. Our disposition of this case requires that we vacate that denial.

[4] We also vacate the district court's dismissal without prejudice of Childree's state law claim. That dismissal was based upon the court's grant of summary judgment in favor of the defendants on both federal claims. Because we reverse the district court's grant of summary judgment on the whistleblower protection claim, the district court on remand should revisit the matter involving Childree's state law claim. *See* 28 U.S.C.A. § 1367(a) (West 1993).

In addition, we vacate the district court's denial of Childree's revised motion for leave to file an amended complaint. In that motion, Childree had sought to add additional state law claims and additional defendants. The court's denial of that motion was based upon its grant of summary judgment on the federal claims in favor of the defendants. Because we reverse that judgment insofar as it concerned the whistleblower protection claim, the district court will have the opportunity on remand to reconsider Childree's motion for leave to file an amended complaint.

False Claims Act of 1986. That provision states, in pertinent part:

> Any employee who is discharged, demoted, suspended, threatened, harassed, or in any other manner discriminated against in the terms and conditions of employment by his or her employer because of lawful acts done by the employee on behalf of the employee or others in furtherance of an action under this section, including investigation for, initiation of, testimony for, or assistance in an action filed or to be filed under this section, shall be entitled to all relief necessary to make the employee whole.

31 U.S.C.A. § 3730(h) (West Supp.1996).

The district court stated that Childree, "at a minimum, must show some nexus between her conduct and the furtherance of a potential False Claims Act action." The court stated that Childree had failed to demonstrate that nexus because there was no "potential False Claims Act action" in any way related to her conduct. Neither Childree nor the government had filed, or had ever intended to file, such an action. To the contrary, the district court found that the government had chosen to pursue the administrative route in lieu of filing a False Claims Act action. The court noted that the DOA administrative hearing was not an "action" contemplated by § 3730(h), and therefore did not put Childree's conduct within the provision's protection. It held that "action"

means a False Claims Act action under either 31 U.S.C. § 3730(a) or (b).[5]

The district court also said that Childree had "never performed any affirmative act to expose any alleged fraud." Instead, it found that she simply had responded to questions asked of her by the ASCS investigator and by the DOA during the NAD hearing. By Childree's own admission, she had only reluctantly participated in that hearing.

Childree, and the United States as amicus curiae, contend that the district court erred in granting summary judgment to the defendants on the whistleblower protection claim. Although they concede that the administrative hearing was not an "action" as contemplated by § 3730(h), they still contend that Childree was protected because she "assist[ed] in an action . . . *to be filed* under [§ 3730(h)]." *See* 31 U.S.C.A. § 3730(h) (West Supp.1996) (emphasis added). They argue that the district court lost sight of the central question in a § 3730(h) claim, which they contend is whether the employer intended to retaliate against the employee because of the false claims information that the employee provided to the government. According to them, the "to be filed" language of § 3730(h) does not mean, as the district court held, that such an action ever has to be actually filed, or even contemplated. Such a "retrospective" interpretation, they contend, does not comport with the plain language of that provision, and would lead to nonsensical results. For example, they

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[5] Subsection (a) deals with actions brought by the government for false claims, and subsection (b) deals with *qui tam* actions brought by private litigants.

point out that under that interpretation, an employee who provided information to the government about her employer's fraud would not be protected if the government settled with the employer *before* filing a false claims action.

Childree and the government argue that "to be filed" means whether an action "could" have been filed. They contend that that broad interpretation of the provision fits with the provision's language and purpose. They argue that § 3730(h) was intended to encourage employees to bring information to the government about false claims against it, without fear of retaliation. *See Neal v. Honeywell, Inc.*, 33 F.3d 860, 861 (7th Cir.1994) ("Section 3730(h), added to the False Claims Act in 1986, is designed to protect persons who assist the discovery and prosecution of fraud and thus to improve the federal government's prospects of deterring and redressing crime."). Because an employee who brings such information to the attention of the government may not know whether a false claims action can or will be filed, it is doubtful that under the "retrospective" construction of "to be filed" the employee would feel sufficiently protected from retaliation to turn the information over to the government. Or so the argument goes.

Childree and the government urge us to follow the Seventh Circuit's decision in *Neal v. Honeywell, Inc.*, which held that § 3730(h) applied to an employee who indirectly had provided false claims information to the government, 33 F.3d at 864, even though in that case a false claims action was never filed, *id.* at 861. After concluding that co-workers were defrauding the government by falsifying company data reports, the plaintiff in *Neal* informed her

employer's legal counsel of the fraud, and the counsel immediately notified the government. *Id.* at 861. The government commenced an investigation, the results of which convinced the employer that the plaintiff's accusations were correct. *Id.* The employer and the government settled for $2.5 million, and no false claims action was ever filed. *Id.*

The *Neal* plaintiff's immediate supervisors allegedly were displeased with her honesty and began to harass as well as physically threaten her. She quit, and several years later, filed a suit under § 3730(h). *Id.* The employer argued that because the government settled rather than sued, § 3730(h) was inapplicable. The Seventh Circuit disagreed, and held that the plain language of § 3730(h) supported the plaintiff's claim, *id.* at 863-64, reasoning that "[i]t makes both linguistic and practical sense to understand the actual 'filed or to be filed' formulation as linking protection to events as they were understood at the time of the investigation or report," *id.* at 864. The court went on to conclude that because litigation was a distinct possibility when the plaintiff reported what she had learned, she was entitled to protection under § 3730(h).

The court recognized that one could argue, as the employer did, that the "to be filed" language is intended simply to ensure that "the employer may not retaliate for reports made before the litigation gets under way." *Id.* Even so, the court concluded that such a construction of the provision was inferior to the court's, because it would lead to the conclusion that by immediately settling with the government – and thus ensuring that a suit was never

filed – the employer had "purchase[d] an option to retaliate against [the plaintiff]." *Id.* The court found that scenario to be unacceptable, and noted that there was nothing in the language or background of § 3730(h) to support such an outcome. *Id.*[6]

We agree with the *Neal* court that the "to be filed" language does not require that a False Claims Act action ever have been filed. We are bound to follow the plain language of a statute, *see, e.g., Scarborough v. Office of Personnel Management*, 723 F.2d 801, 813 (11th Cir.1984), and there is nothing about the plain language of "to be filed" that suggests such a narrow interpretation. Moreover, as the Seventh Circuit pointed out in *Neal*, a retrospective test which furnished no protection unless an

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[6] Besides *Neal*, only one other court of appeals has addressed § 3730(h). That case, *Robertson v. Bell Helicopter Textron, Inc.*, 32 F.3d 948 (5th Cir.1994), *cert. denied*, ___ U.S. ___, 115 S.Ct. 1110, 130 L.Ed.2d 1075 (1995), involved a situation quite different from the present one, and for that reason, it is not particularly useful for present purposes. Although the *Robertson* plaintiff had voiced concerns to his superiors that his employer might be overcharging the government, *id.* at 949-50, he had never referred to the overcharging as illegal or unlawful, *id.* at 951 & n. 2. He had never voiced an intention to file a *qui tam* action under § 3730(b), nor had he ever spoken to government officials about the alleged overcharging. *Id.* at 952. However, when he was laid off as part of a general workforce reduction, he brought suit against his employer under § 3730(h) claiming unlawful retaliation.

The Fifth Circuit held that § 3730(h) did not protect the plaintiff because there was insufficient evidence that he had furthered or assisted in any "action," and also because there was insufficient evidence that his employer was aware that the plaintiff was investigating the overcharging.

action was eventually filed would preclude protection in every case where the evidence of wrongdoing was so compelling that the employer settled before an action was filed. 33 F.3d at 864. We join the Seventh Circuit in disbelieving that Congress intended such a result, and we join it in holding that § 3730(h) protection is available not only where a false claims action is actually filed, but also where the filing of such an action, by either the employee or the government, was "a distinct possibility" at the time the assistance was rendered.

We recognize that there will be cases, such as this one, in which the employee was apparently unaware of the existence of the False Claim Act in general, and § 3730(h) in particular, at the time the employee acted. There is some force to the argument that a provision cannot encourage acts by offering to protect the actor where the actor is unaware of the provision and the offered protection. However, nothing in the language of § 3730 suggests that its protections are limited to those who were motivated by it. The provision contains no knowledge requirement, and we will not read one into it.

We turn now to an application of the distinct possibility test to the facts of this case viewed in the light most favorable to Childree, the non-movant. Childree concedes that she never even considered filing a § 3730(b) *qui tam* action, so it is obvious that such an action was never a distinct possibility. The question, then, is whether the government's filing a § 3730(a) action was a distinct possibility at the time Childree rendered her assistance. We think that summary judgment should not have been granted against Childree on this issue. Viewing the facts in Childree's favor, in July 1989, she provided extensive

information about her employer's fraudulent re-billings to Taylor, the ASCS official who visited UAP/GA's office. Several years later, at the NAD hearing, Childree again provided the information about her employer's fraudulent re-billings to the DOA. Based upon Childree's testimony, the DOA found that "Cook [a Varner Bass representative] and UAP/GA Ag. Chem. created documentation to create an appearance that crop inputs used on the farming operations . . . were separately ordered, delivered, used and paid for by the persons in whose names the accounts were later established." Moreover, the DOA concluded that "[o]ne of the most egregious examples of falsifying documents, in addition to the false leases, involved Cook and UAP/GA Ag. Chem."

If those asserted facts, and Childree's deposition testimony about the re-billings, are ultimately determined to be true, then a § 3730(a) action was a distinct possibility at the time Childree rendered her assistance. Therefore, summary judgment should not have been granted in favor of the defendants. Accordingly, we reverse that judgment and remand to the district court for further proceedings consistent with this opinion.

B. THE KU KLUX KLAN ACT CLAIM, § 1985(3)

The district court also granted summary judgment in favor of the defendants on Childree's Ku Klux Klan Act of 1871 claim, 42 U.S.C. § 1985(3). The elements of a cause of action under § 1985(3) are: (1) a conspiracy, (2) for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the

laws; and (3) an act in furtherance of the conspiracy, (4) whereby a person is either injured in his person or property or deprived of any right or privilege of a citizen of the United States. *Lucero v. Operation Rescue*, 954 F.2d 624, 627 (11th Cir.1992). The second element "requires a showing of some 'racial, or perhaps otherwise class-based, invidiously discriminatory animus behind the conspirators' action.' " *Id.* at 628 (quoting *United Bhd. of Carpenters & Joiners of Am., Local 610 v. Scott*, 463 U.S. 825, 829, 103 S.Ct. 3352, 3356, 77 L.Ed.2d 1049 (1983)); *see also Bray v. Alexandria Women's Health Clinic*, 506 U.S. 263, 269, 113 S.Ct. 753, 759, 122 L.Ed.2d 34 (1993) (holding that whatever the precise meaning of "class" may be, it "unquestionably connotes something more than a group of individuals who share a desire to engage in conduct that the § 1985(3) defendant disfavors.").

The district court held that Childree failed to establish the second element of her Klan Act claim, explaining that:

> Even assuming Section 1985(3) can be applied in some non-racial contexts, this Court finds that Plaintiff, as an alleged whistle-blower, is not a victim of some "otherwise class-based invidiously discriminatory animus." The Court finds that "whistle-blowers" instead merely fall within *Bray*'s "group of individuals who share a desire to engage in conduct the Section 1985(3) defendant disfavors."

We agree. Although this Court has never addressed specifically whether whistleblowers are a protected class under § 1985(3), we repeatedly have declined to extend that section to apply in non-racial contexts. *See, e.g.*,

Lucero, 954 F.2d at 628 (refusing to apply § 1985(3) to protect women seeking abortions as a class); *McLellan v. Mississippi Power & Light Co.*, 545 F.2d 919, 933 (5th Cir.1977) (en banc) (refusing to apply § 1985(3) to protect bankrupts as a class); *cf. Burrell v. Board of Trustees of Ga. Military College*, 970 F.2d 785, 794 (11th Cir.1992) (noting that § 1985(3)'s "narrow intent requirement erects a significant hurdle for section 1985(3) plaintiffs."), *cert. denied*, 507 U.S. 1018, 113 S.Ct. 1814, 123 L.Ed.2d 445 (1993). To the best of our knowledge, no circuit court has ever held that whistleblowers are a protected class under § 1985(3), and some have expressly declined to do so. *See, e.g., Garris v. James L. Gray, Inc.*, 912 F.2d 808, 813 (5th Cir.1990) (declining to extend § 1985(3) protection to whistleblowers), *cert. denied*, 499 U.S. 907, 111 S.Ct. 1108, 113 L.Ed.2d 218 (1991); *Buschi v. Kirven*, 775 F.2d 1240, 1258 (4th Cir.1985) (same). Indeed only one district court of which we are aware has interpreted § 1985(3) to extend to whistleblowers. *See Lapin v. Taylor*, 475 F.Supp. 446 (D.Haw.1979).

We decline to apply § 1985(3) to protect whistleblowers as a class. Two types of classes come within § 1985(3)'s protection: (1) classes having common characteristics of an inherent nature – i.e., those kinds of classes offered special protection under the equal protection clause, and (2) classes that Congress was trying to protect when it enacted the Ku Klux Klan Act. *Kimble v. D.J. McDuffy, Inc.*, 648 F.2d 340, 347 (5th Cir.) (en banc), *cert. denied*, 454 U.S. 1110, 102 S.Ct. 687, 70 L.Ed.2d 651 (1981). Whistleblowers simply do not fall under either type of class. *See, e.g., McLellan*, 545 F.2d at 932-33. The broad

construction of § 1985(3) that Childree requests is inconsistent with the history and purpose of that provision, with our previous readings of it, and with the better reasoned precedent on the issue. Accordingly, we hold that the district court properly granted summary judgment to the defendants on the § 1985(3) claim.

III. CONCLUSION

We **AFFIRM** the district court's grant of summary judgment on the Ku Klux Klan Act claim in favor of the defendants. We **REVERSE** the district court's grant of summary judgment in favor of the defendants on the whistleblower protection claim. We **VACATE**: the district court's denial of Childree's revised motion for leave to file an amended complaint; the court's denial as moot of ConAgra's motion seeking summary judgment on the grounds that it did not employ Childree; and the court's dismissal without prejudice of Childree's state law claim. We **REMAND** the case for further proceedings consistent with this opinion.

Denise CHILDREE, Plaintiff,

v.

UAP/GA AG CHEM, INC. and Conagra Inc., Defendants.

Civ. A. No. 1:94-CV-1312-FMH.

United States District Court,
N.D. Georgia,
Atlanta Division.

June 20, 1995.

Steven Keith Leibel, David C. Ates, Steven K. Leibel & Associates, Atlanta, GA, Julian Webb, Office of Julian Webb, Donalsonville, GA, for plaintiff.

Thomas H. Christopher, Jeffrey A. VanDetta, Kilpatrick & Cody, Atlanta, GA, Thomas L. Dueber, Office of Thomas L. Dueber, Greeley, CO, for defendants.

ORDER

HULL, District Judge.

Plaintiff Denise Childree files this action under the "whistle-blower" provision of the False Claims Amendments Act of 1986, 31 U.S.C. § 3730(h) (1994), and under the Ku Klux Klan Act of 1871, 42 U.S.C. § 1985(3) (1994). Plaintiff's Complaint also includes an intentional infliction of emotional distress claim under state law. The essence of Plaintiff's claims are that Defendants terminated Plaintiff in retaliation for testifying in an administrative hearing before the United States Department of

Agriculture ("DOA"), and for providing testimony potentially damaging to Defendant UAP in that hearing. Plaintiff also contends that Defendants conspired to deprive Plaintiff of her right to testify truthfully before the DOA.

The DOA administrative hearing involved charges that a third party, Varner/Bass Enterprises, had submitted claims for excessive amounts of money to the Agriculture Stabilization and Conservation Service. Varner/Bass is one of Defendant UAP's customers. Although the DOA cited the possible involvement of Defendant UAP in Varner/Bass's activities, no claims have been filed against Defendant UAP under the False Claims Act.

This action is before the Court on Defendants UAP and ConAgra's Motion for Summary Judgment [32-1], Defendant ConAgra's earlier Motion for Summary Judgment [13-1], Plaintiff's Motion for Leave to File Amended Complaint [22-1], Defendants' Motion to Amend Answers [23-1], Plaintiff's Revised Motion for Leave to File Amended Complaint [28-1], Plaintiff's Motion to Extend Time for Discovery [26-1], and Plaintiff's Motion to File Response Brief [41-1]. After reviewing the record in its entirety, the Court outlines the version of events most favorable to Plaintiff.

I. *FACTS*

For many years, Plaintiff was employed by Defendant UAP/GA AG Chem. (hereinafter "Defendant UAP") in Defendant UAP's Donalsonville, Georgia office. Plaintiff alleges that in 1989 Defendant UAP prepared documents to allow some of Defendant UAP's customers to draw excessive amounts of money from the United States

through the Agriculture Stabilization & Conservation Service (hereinafter "ASCS").

The ASCS reimburses farmers for monies expended in connection with various farming operations. Defendant UAP sells fertilizer, seeds, and related products to farmers. Once an entity like Defendant UAP bills these farmers for various products, the farmers then submit claims for reimbursements to the ASCS. However, the ASCS pays a maximum of $50,000 per claim. Varner/Bass returned a number of invoices received from Defendant UAP explaining that Plaintiff had incorrectly billed the invoices to Varner/Bass and that the invoices should have been billed to a number of other individuals. Defendants claim farmland is owned by one company but leased by different individuals and that the bills should have been invoiced to various other individuals.

Plaintiff contends that Varner/Bass and Defendant participated in a scheme whereby a UAP bill originally sent to Varner/Bass was returned and re-billed to several different individuals so that these several individuals could then submit claims to the ASCS. In this manner, Plaintiff alleges that Defendant UAP assisted Varner/Bass in circumventing the ASCS's $50,000 maximum reimbursement limit.

According to Plaintiff, she was asked to prepare the re-billings to be presented to the ASCS. Plaintiff further alleges that she refused to prepare the re-billings, and that the documents sat on her desk until Mr. Andrews, another employee, completed them. After the re-billings were completed by Mr. Andrews, Plaintiff copied the documents because they were represented as coming

from her office. Plaintiff states that she had no "planned use" for the documents she copied, "None whatsoever."

Plaintiff raised her suspicions that Defendant UAP was engaging in illegal activity with Mr. Valentine, a credit manager with Defendant UAP. Plaintiff informed Mr. Valentine that she felt that preparing the re-billings was unethical and immoral, and that Defendant UAP was assisting its clients in obtaining excessive payments from the government. Plaintiff alleges Mr. Valentine stated, "Who is to say you wouldn't do it if given the opportunity."

Plaintiff then raised her suspicions with Mr. Bennett, another credit manager with Defendant UAP. Plaintiff asked Mr. Bennett what was going on with Varner/Bass. Mr. Bennett responded by saying that if he did not tell her, she would not know. Plaintiff then informed Mr. Bennett of her belief that Defendant UAP was assisting Varner/Bass in perpetrating a fraud on the United States Government. Mr. Bennett purportedly responded, "You said it, not me."

Plaintiff reported her suspicions to supervisors Mr. Mathis and Mr. Andrews. Plaintiff alleges Mr. Mathis stated, "This was done all over all the time by [Defendant UAP]. There was nothing to it, and [he would] take care of it." According to Plaintiff, she was asked to prepare and process the documents to fulfill Varner/Bass's request for re-billings, but she refused. The unprepared re-billings remained on her desk until they were prepared by Mr. Andrews.

In 1989, Eloise Taylor, a local ASCS official, visited Defendant UAP's Donalsonville office. Ms. Taylor was

met by Plaintiff and Mr. Mathis. Ms. Taylor requested verification of the validity of the re-billings submitted to the ASCS on behalf of Varner/Bass. Plaintiff reportedly looked at Mr. Mathis, and Mr. Mathis instructed her to tell the truth. Plaintiff informed Ms. Taylor that she could not verify the validity of the re-billings. Plaintiff then relayed to Ms. Taylor her version of the events involving the preparation of the Varner/Bass documents. Ms. Taylor asked Plaintiff to prepare a written statement containing the information Plaintiff had relayed orally. Plaintiff complied with this request.

After Ms. Taylor's visit, Plaintiff made copies of all the documents Ms. Taylor sought to verify. Plaintiff contends that she did so with the permission of her supervisor, Mr. Mathis. Plaintiff alleges Mr. Mathis told Plaintiff that she should "do whatever [she] had to do to protect [herself]." Plaintiff then copied the documents, took them to her home, and hid them there in 1989. Plaintiff "never" took the documents out of the box again until she was subpoenaed to testify.

Four years later in 1993, Plaintiff was subpoenaed to testify before the United States Department of Agriculture, concerning farming operations of Varner/Bass. The *subpoena duces tecum* directed Plaintiff to produce the 1989 documents.

On June 24, 1993, Plaintiff testified before the Department of Agriculture about the 1989 Varner/Bass documents. In attendance at the hearing was Gary Callahan, an officer with Defendant UAP. Plaintiff states that she reluctantly testified about the re-bills and Defendant

UAP's "involvement in the attempt to defraud the United States Government."

During a break at the hearing, Plaintiff alleges that Mr. Callahan went into the room where the witnesses were sequestered and threw a yellow pad on a table and told Mr. Mathis, "these were the issues, that [Plaintiff] had just blown the whole thing, and that [Plaintiff] didn't know how to handle business." Denying this, Defendants contend that no one threatened Plaintiff in connection with the hearing, and that Plaintiff was advised only to tell the truth as to what actually happened.

On July 1, 1993, Plaintiff was suspended from her employment without pay. Plaintiff was terminated from her position on July 9, 1993. In the letter informing Plaintiff of her termination, Defendant UAP informed Plaintiff that she was terminated for removing confidential customer files from UAP's premises without authorization to do so.

On August 10, 1994, the National Appeals Division ("NAD") of the DOA issued a finding that Varner/Bass Enterprises and a number of farmers and farming operations participated in a scheme or device designed to evade payment limitations. That ruling is currently being appealed. The NAD named Defendant UAP as having assisted in and participated in the scheme, although neither Defendant UAP nor ConAgra was a party to the DOA proceeding. Since Defendants were not parties to the DOA hearing, Defendants did not produce evidence on their behalf or have the opportunity to cross-examine witnesses. To date, the NAD has never asked Defendants

for an explanation of any credits or rebillings allegedly made.

II. *PROCEDURAL BACKGROUND*

On May 18, 1994, Plaintiff filed this Complaint against Defendants UAP/GA AG Chem., Inc. and ConAgra, Inc. Plaintiff alleges that Defendant UAP threatened her to keep quiet prior to her testimony before the Department of Agriculture, and that Defendant UAP and Defendant ConAgra jointly decided to terminate Plaintiff after she testified before the DOA. Defendant UAP is a subsidiary of ConAgra, Inc.

On September 15, 1994, Defendant ConAgra filed a Motion for Summary Judgment [13-1], arguing that even assuming Plaintiff's allegations were true, that Plaintiff was an employee of UAP and not ConAgra, and that Defendant ConAgra played no role in threatening Plaintiff prior to her testimony or in the decision to terminate Plaintiff. Plaintiff's Response [15-1] pointed out that discovery had not been completed and that Plaintiff did not yet have the opportunity to investigate what role Defendant ConAgra may have had in Plaintiff's termination. In its Reply [16-1] to Plaintiff's Response, Defendant ConAgra consented to delay ruling on its Motion until the end of discovery.

On March 6, 1995, Defendants UAP and ConAgra filed a joint Motion for Summary Judgment [32-1]. Defendants contend that even assuming Plaintiff's allegations to be true, Plaintiff has engaged in no activity that is protected by the "whistle-blower" provision of the False

Claims Act. Defendants also assert that Plaintiff's Complaint fails to state a claim under the Ku Klux Klan Act, because Plaintiff fails to allege that she was the victim of any class-based discrimination. Defendants further claim that there is no evidence to support Plaintiff's state law cause of action.

III. *DISCUSSION*

A. *SUMMARY JUDGMENT STANDARD*

Federal Rule of Civil Procedure 56(c) defines the standard for summary judgment as follows: courts should grant summary judgment when "there is no genuine issue as to any material fact and . . . the moving party is entitled to a judgment as a matter of law." Fed.R.Civ.P. 56(c). The general rule of summary judgment in the Eleventh Circuit states that the moving party must show the court that no genuine issue of material fact should be decided at trial. *Clark v. Coats & Clark, Inc.*, 929 F.2d 604, 606-09 (11th Cir.1991). Unless the movant for summary judgment meets its burden under Federal Rule of Civil Procedure 56, the obligation of the opposing party does not arise even if no opposing evidentiary material is presented by the party opposing the motion. *Clark*, 929 F.2d at 607-08.

While all evidence and factual inferences are to be viewed in a light most favorable to the nonmoving party, *Rollins v. TechSouth, Inc.*, 833 F.2d 1525, 1529 (11th Cir.1987); *Everett v. Napper*, 833 F.2d 1507, 1510 (11th Cir.1987), "the mere existence of *some* alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the

requirement is that there be no *genuine* issue of *material* fact." *Anderson v. Liberty Lobby*, 477 U.S. 242, 248, 106 S.Ct. 2505, 2510, 91 L.Ed.2d 202 (1986). An issue is not genuine if it is unsupported by evidence, or if it is created by evidence that is "merely colorable" or is "not significantly probative." *Id.* at 250, 106 S.Ct. at 2511. Similarly, a fact is not material unless it is identified by the controlling substantive law as an essential element of the nonmoving party's case. *Id.* at 248, 106 S.Ct. at 2510.

Where neither party can prove either the affirmative or the negative of an essential element of a claim, the movant meets its burden on summary judgment by showing that the opposing party will not be able to meet its burden of proof at trial. *Celotex Corp. v. Catrett*, 477 U.S. 317, 325, 106 S.Ct. 2548, 2553, 91 L.Ed.2d 265 (1986). In *Celotex*, the Supreme Court interpreted Federal Rule of Civil Procedure 56(c) to require the moving party to demonstrate that the nonmoving party lacks evidence to support an essential element of its claim. Thus, the movant's burden is "discharged by 'showing' – that is, pointing out to the district court – that there is an absence of evidence to support the nonmoving party's case." *Id.*

B. *SCOPE OF THE WHISTLE-BLOWER PROTECTION IN SECTION 3730(h) OF THE FALSE CLAIMS ACT*

Plaintiff alleges that Defendants terminated Plaintiff's employment as retaliation for Plaintiff's removing documents and testifying in the DOA hearing about the reimbursement claims submitted by Varner/Bass Enterprises to ASCS. According to Plaintiff, Defendants'

alleged retaliatory action violated the "whistle-blower" provision in Section 3730(h) of the False Claims Act. *See* 31 U.S.C. § 3729 *et seq.* (1994).

Section 3729 of the False Claims Act provides that any person making or submitting false claims to the government shall be liable for substantial penalties and treble damages. 31 U.S.C. § 3729 (1994).[1] Section 3730 of

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[1] Section 3729 of the False Claims Act states:

§ § 3729. False Claims

(a) Liability for Certain Acts. – Any person who –

(1) knowingly presents, or causes to be presented, to an officer or employee of the United States Government, or a member of the Armed Forces of the United States a false or fraudulent claim for payment or approval;

(2) knowingly makes, uses, or causes to be made or used, a false record or statement to get a false or fraudulent claim paid or approved by the government;

(3) conspires to defraud the government by getting a false or fraudulent claim allowed or paid;

(4) has possession, custody, or control of property or money used, or to be used, by the Government and, intending to defraud the Government or willfully to conceal the property, delivers, or causes to be delivered, less property than the amount for which the person receives a certificate or receipt;

(5) authorized to make or deliver a document certifying receipt of property used, or to be used, by the Government and intending to defraud the Government, makes or delivers the receipt

the False Claims Act provides that the United States Government, or a private citizen, may bring a cause of action for false claims against any entity that makes false claims against the government in violation of Section 3729. 31 U.S.C. § 3730(a), (b) (1994). Section 3730(a) further provides that "[t]he Attorney General diligently shall

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> without completely knowing that the information on the receipt is true; -
>
> (6) knowingly buys, or receives as a pledge or an obligation or debt, public property from an officer or employee of the Government, or a member of the Armed Forces, who lawfully may not sell or pledge the property; or
>
> (7) knowingly makes, uses, or causes to be made or used, a false record or statement to conceal, avoid, or decrease an obligation to pay or transmit money or property to the Government,
>
> is liable to the United States Government for a civil penalty of not less than $5,000 and not more than $10,000, plus three times the amount of damages which the Government sustains because of the act of that person . . .
>
> . . . .
>
> (c) Claim defined. - For purposes of this section, "claim" includes any request or demand, whether under contract or otherwise, for money or property which is made to a contractor, grantee, or other recipient if the United States Government provides any portion of the money or property which is requested or demanded, or if the Government will reimburse such contractor, grantee, or other recipient for any portion of the money or property which is requested or demanded.

31 U.S.C. § 3729 (1994).

investigate a violation under [S]ection 3729. If the Attorney General finds that a person has violated or is violating [S]ection 3729, the Attorney General may bring a civil action against the person." 31 U.S.C. § 3730(a) (1994). If the Attorney General does not bring a civil action, Section 3730(b) provides that a private person may bring a *qui tam* action in the name of the government. 31 U.S.C. § 3730(b) (1994).[2]

The purpose of the False Claims Act is to discourage fraud against the government. The fraternal twin of this purpose is to encourage those with knowledge of fraud to come forward. H.R.Rep. No. 660, 99th Cong., 2d Sess. 22 (1986), U.S.Code Cong. & Admin.News 1986, pp. 5266, 5287. Accordingly, in enacting the False Claims Amendments Act of 1986, Congress provided for a whistleblower provision in Section 3730(h) to protect employees, who come forward, from adverse employment decisions. Section 3730(h) protects employees who bring *qui tam* actions under Section 3730(b) or who engage in conduct "in furtherance of an action" under the False Claims Act.

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[2] Under Section 3730(b) of the False Claims Act, a person may bring a *qui tam* action pursuant to the Act by filing a complaint with the court, and by serving a copy of the complaint with a written disclosure of substantially all material evidence and information on the United States Government in a manner consistent with Federal Rule of Civil Procedure 4(d)(4). The complaint shall be filed in camera, and shall remain under seal for 60 days. Before the expiration of the 60 days, the government shall either proceed with the action, or notify the court that it declines to take over the action. If the government declines to take over the action, the *qui tam* plaintiff shall have the right to conduct the action. 31 U.S.C. § 3730(b) (1994).

31 U.S.C. § 3730(h). Section 3730(h) outlines the scope of this whistle-blower protection as follows:

> Any employee who is discharged, demoted, suspended, threatened, harassed, or in any other manner discriminated against in the terms of employment by his or her employer because of lawful acts done by the employee on behalf of the employee or others in furtherance of an action under this section, including investigation for, initiation of, testimony for, or assistance in an action filed or to be filed under this section, shall be entitled to all relief necessary to make the employee whole. . . .

31 U.S.C. § 3730(h) (1994).[3]

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[3] The full text of Section 3730(h) reads:

> Any employee who is discharged, demoted, suspended, threatened, harassed, or in any other manner discriminated against in the terms of employment by his or her employer because of lawful acts done by the employee on behalf of the employee or others in furtherance of an action under this section, including investigation for, initiation of, testimony for, or assistance in an action filed or to be filed under this action, shall be entitled to all relief necessary to make the employee whole. Such relief shall include reinstatement with the same seniority status such employee would have had but for the discrimination, 2 times the amount of back pay, interest on the back pay, and compensation for any special damages sustained as a result of the discrimination, including litigation costs and reasonable attorneys' fees. An employee may bring an action in the appropriate district court of the

Plaintiff concedes that no actions for false claims have been brought against Defendants either by the government or by Plaintiff. Plaintiff admits that she never knew about the False Claims Act and never filed or contemplated filing a claim under the False Claims Act. Plaintiff acknowledges that she never initiated an internal investigation or took any action beyond copying the documents in 1989 and testifying reluctantly under subpoena in 1993. However, Plaintiff contends that the courts have interpreted liberally the whistle-blower provision to cover employees whose conduct ultimately assisted in the investigation of a false claim to the government, even if the employee was not aware of her assistance or of the False Claims Act at the time of her conduct.

In response, Defendants assert that Plaintiff is clearly not protected by the whistle-blower provision because no claim has been filed or is to be filed under the False Claims Act by the government or by Plaintiff. Plaintiff admits that she never knew about the False Claims Act and never contemplated filing a *qui tam* action. Also, Defendants stress that Plaintiff's conduct in removing the documents in 1989 and in testifying under subpoena before the DOA against Varner/Bass is not, assuming all of Plaintiff's allegations to be true, conduct protected by the whistle-blower provision in Section 3730(h) of the False Claims Act.

United States for the relief provided in this subsection.

31 U.S.C. § 3730(h) (1994).

Thus, the main issue is whether Plaintiff's conduct here falls within the scope of the whistle-blower protection in Section 3730(h) of the False Claims Act.

1. *Legislative History of Section 3730(h) of the False Claims Act*

The legislative history of the whistle-blower provision itself affords some insight into the scope of Section 3730(h). Congress indicated that Section 3730(h) was intended as a narrow remedy for *qui tam* plaintiffs and those who assist them or the government in filing suits under the Act. *See* 132 Cong.Rec. 22340 (1986) ("In addition, the bill provides 'whistle-blower protection' to *qui tam* plaintiffs who suffer reprisals."); 132 Cong.Rec. 22336 (1986) (whistle-blower protection provided to those who report fraud "in conjunction with false claims prosecutions."). Other portions of the legislative history support a broad construction of what constitutes such conduct. *See* 132 Cong.Rec. 29322 (1986) (whistle-blower protection for action "in any way connected with a person's activity under this law."). Though this has created some confusion among courts interpreting the language of the statute, this Court finds that the legislative history of Section 3730(h) is fairly consistent in outlining the purpose of the Section.

At least one court has found the above portions of the legislative history of Section 3730(h) contradictory, finding that the first two portions of the legislative history cited above support a narrow construction of Section 3730(h), while the latter portion supports a broad construction. *Neal v. Honeywell,* 826 F.Supp. 266, 271 n. 5

(N.D.Ill.1993). However, this Court finds that the legislative history is not contradictory, and that the legislative history can be harmonized to support an overall purpose. Section 3730(h) was passed to remove some of the hurdles which may obstruct the bringing of a False Claims Act action. It was designed to do so by protecting employees who engage in a broad range of conduct, as long as that conduct is in some way related to a False Claims Act action.

The most direct statement addressing the scope of Section 3730(h) is a Senate report discussing the reach of Section 3730(h)'s remedy. The Senate report states:

> Consequently, the Committee believes protection should extend not only to actual qui tam litigants, but those who assist or testify for the litigant, as well as those who assist the Government in bringing a false claims action. Protected activity should therefore be interpreted broadly.

Sen.Rep. No. 345, 99th Cong., 2d Sess. 34, *reprinted in* 1986 U.S.C.C.A.N. 5266, 5299. This report supports the conclusion that even though protected activity should be construed broadly, such activity must be in some way related to a false claims action under the False Claims Act.

In debates prior to the enactment of the False Claims Amendments Act, members of Congress repeatedly noted that the False Claims Act was the primary vehicle through which the government could file a civil action seeking penalties from those who attempt to defraud the government. 132 Cong.Rec. H9382 (1986) (statement of Rep. Glickman); 132 Cong.Rec. S15515 (1986) (statement of Sen. Grassley). Thus, Congress passed measures designed to strengthen the government's ability to

employ Section 3730(a) & (b) actions in order to seek civil redress for the government. The direct results of the debates were the passage of the whistle-blower provision, and an increase in the penalty the government can receive pursuant to civil actions filed under the Act.[4] The only way that the purpose of strengthening the government's ability to bring False Claims Act actions can be reconciled with the enactment of the whistle-blower provision is if there was some nexus between the protection of Section 3730(h) and the filing of a False Claims Act action.

The language of the statute itself is evidence of Congress's intent to tie the whistle-blower protection of Section 3730(h) to the filing of a False Claims Act action. Section 3730(h) uses the word "action" twice in defining the scope of its protection. The statute reads "any employee who is discharged . . . because of lawful acts done by the employee . . . in furtherance of an action under this section, including [various conduct] in assistance in an action . . . under this section." 31 U.S.C. § 3730(h) (1994). Throughout Section 3730, Congress used the word "action" to refer to a civil action brought under subsections (a) or (b) of Section 3730. There is no reason to suggest that Congress's use of the word action in Section 3730(h) means anything different than what the word "action" means as it is used in other portions of Section 3730. To the contrary, there is a presumption that a word (or words) mean the same thing throughout a

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[4] Under the current law, the government can recover $5,000-$10,000 for every fraudulent submission. Under the old law, the maximum penalty was $2,000.

statute. *CIR v. Keystone Consol. Indus., Inc.*, ___ U.S. ___, 113 S.Ct. 2006, 124 L.Ed.2d 71 (1993). Accordingly, the statute itself is the best evidence that Congress sought to tie the protection of Section 3730(h) to a False Claims Act action.[5]

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[5] In *Betchel Constr. Co. v. Secretary of Labor*, No. 94-CV-4067 (11th Cir. Apr. 20, 1995), the Court highlighted the Secretary's interpretation of specific language in the Energy Reorganization Act. The Act provides, in relevant part, that employers could not discriminate against an employee because that employee has:

> (1) commenced, caused to be commenced, or is about to commence or cause to be commenced a proceeding under this chapter . . . ;
>
> (2) testified or is about to testify in any such proceeding; or
>
> (3) assisted or participated or is about to assist or participate in any manner in such a proceeding or in any other manner in such a proceeding or in any other action to carry out the purposes of this chapter. . . .

42 U.S.C. § 5851(a) (1994). The Secretary interpreted the language "in any other action" to include the filing of internal complaints because, otherwise, the language would be merely surplusage. In contrast, there is no such superfluous language in the False Claims Act. The only action referred to is the civil action referred to in subsections (a) and (b) of Section 3730.

Also, in *Betchel*, the Court noted that the Secretary of Labor interpreted the whistle-blower provision in the Energy Reorganization Act as protecting internal whistle-blowers, and that the Secretary's interpretation was subject to deference because the Court was required to "defer to [the Secretary's] interpretation of [the statute] committed to [his agency] for administration if, absent a clear and unambiguous indication of congressional intent, the agency has construed the statute reasonably." *Betchel, supra* (citing *Chevron v. Natural Resources*

2. *Plaintiff's Conduct is Not Protected By Section 3730(h)*

Taking Plaintiff's version of the facts as true, the Court finds that Plaintiff's conduct is not covered by the whistle-blower provision in Section 3730(h). Plaintiff constructively admits that her conduct was not in furtherance of an action filed or to be filed by Plaintiff under Section 3730(b). Rather, Plaintiff stresses that her conduct should be construed to be in assistance to an action filed or to be filed by the government under Section 3730(a). The Court finds that Plaintiff's conduct was not in furtherance of an action filed or to be filed by the government under Section 3730(a) for several reasons.

First, Plaintiff's conduct is not covered by the language of Section 3730(h), which encompasses only conduct by an employee "in furtherance of an action" filed or to be filed under the False Claims Act. 31 U.S.C. § 3730(h) (1994). Section 3730(h) continues that such conduct includes "investigation for, initiation of, testimony for, or assistance in an action filed or to be filed under this section." The language of Section 3730(h), even broadly construed, clearly provides that Plaintiff, at a minimum, must show some nexus between her conduct and the furtherance of a potential False Claims Act action. *X Corp. v. Doe*, 816 F.Supp. 1086, 1095-96 (E.D.Va.1993); *Hardin v.*

Defense Council, Inc., 467 U.S. 837, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984)).

DuPont Scandinavia (ARA-JET), 731 F.Supp. 1202, 1205 (S.D.N.Y.1990).[6]

In dismissing the plaintiff's claims in *Hardin*, the district court held that the plaintiff failed to state a claim under Section 3730(h) because Plaintiff's alleged loss of commissions "was the result of her refusal to participate in the alleged scheme, not the results of steps taken in furtherance on the action." *Hardin*, 731 F.Supp. at 1205. Similarly, in granting summary judgment on the plaintiff's claims in *X Corp.*, the district court held that the employee's actions in secretly copying and removing documents from X Corp.'s premises was not in furtherance of any action filed or to be filed under the False Claims Act. The employee did not inform anyone of that clandestine activity. Even though the employee mentioned his concerns about potential liability under the False Claims Act, the employee took no action to initiate a claim or to assist the government in initiating a claim. *X Corp.*, 816 F.Supp. at 1096.[7]

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[6] Some courts have held that even actions shown to be "in furtherance of an action to be filed under the Act" are "insufficient" as a matter of law because "[t]he qui tam action must actually be filed." *See, e.g., Casarez v. Delco Systems Operations*, No. 92-CV-6844-AWT, 1993 WESTLAW 169255 (C.D.Cal. Mar. 1, 1993).

[7] Other federal courts have held that even "internal" whistle-blowing is not protected under Section 3730(h) and other federal statutes. *See, e.g., Brown & Root Inc. v. Donovan*, 747 F.2d 1029, 1031-36 (5th Cir.1984) (Energy Reorganization Act, 42 U.S.C. § 5851(a)); *Casarez v. Delco Systems Operations*, No. 92-CV-6844-AWT, 1993 WESTLAW 169255 (C.D.Cal. Mar. 1, 1993).

Second, Plaintiff provided testimony in a hearing before the Department of Agriculture. The hearing before the Department of Agriculture is not a False Claims Act action under Section 3730(a). Plaintiff's brief surmises that the government still may bring a False Claims Act action. Quite the contrary, the government has not filed a False Claims Act action under Section 3730(a), but instead has sought redress already through administrative procedures within Department of Agriculture. The DOA found that Varner/Bass Enterprises defrauded the government and assessed a civil penalty against Varner/Bass. Plaintiff speculates only that the government still may pursue a False Claims Act action, but the evidence shows that the government has chosen the administrative remedy route as opposed civil action under the False Claims Act. There is no evidence that the government is considering filing a False Claims action.

Third, even assuming *arguendo* that the government was considering filing a False Claims Act action, Plaintiff's conduct was not in furtherance of any such potential action. In her deposition, Plaintiff states that she relayed to two of her superiors her belief that one of Defendant UAP's clients was trying to defraud the government. Plaintiff refused to become involved in the alleged scheme. However, Plaintiff never performed any affirmative act to expose any alleged fraud. *Hardin v. DuPont Scandinavia (ARA-JET)*, 731 F.Supp. 1202, 1205 (S.D.N.Y.1990) (refusing to participate in employer's scheme not enough). When Ms. Taylor, of the ASCS, visited Plaintiff, Plaintiff gave a statement to Ms. Taylor, who was attempting to verify the validity of documents submitted by Varner/Bass, but Plaintiff never initiated

the contact with the ASCS and never filed a complaint with the ASCS alleging that Defendant UAP or Varner/Bass was attempting to defraud the government. Plaintiff also never filed any complaint internally, nor did she contact any government official to convey her suspicions that Defendant UAP or Varner/Bass was engaging in fraudulent activity. All Plaintiff did was copy the documents she believed to be fraudulent, took the documents home, and stored them there for four years. *X Corp. v. Doe*, 816 F.Supp. 1086, 1095-96 (E.D.Va.1993) (secretly copying and removing documents, warning employer about False Claims Act liability, and circulating memoranda concerning the False Claims Act is not enough).

After taking the alleged fraudulent documents home, Plaintiff did nothing for four years. Plaintiff, again, did not file any internal complaints or any complaints with any government agency. Plaintiff also did not file a *qui tam* action,[8] initiate a federal inquiry into Defendant UAP's conduct, or investigate any conduct on the part of Defendant UAP. Four years after Plaintiff copied the documents, Plaintiff was subpoenaed to appear in a hearing before the Department of Agriculture. Plaintiff produced the documents she copied pursuant to a subpoena. Moreover, Plaintiff states in her deposition that she "reluctantly testified" about the very events she felt constituted a fraud against the government. Consequently, the conduct in which Plaintiff did engage was compelled.

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[8] Plaintiff contends that she is barred from filing a *qui tam* action because the government is already a party to the DOA administrative hearing involving the same false claims. *See* 31 U.S.C. § 3730(e)(3) (1994).

Section 3730(h) was designed to protect those who come forward with evidence of fraud against the government. H.R.Rep. 660, 99th Cong., 2d Sess. 22 (1986); *Neal v. Honeywell, Inc.*, 826 F.Supp. 266, 269 (N.D.Ill.1993). Section 3730(h) is not intended to protect an employee who merely refused to participate in the scheme and kept the documents in a box at home for four years until subpoenaed and required to testify and produce them.

Finally, in any event, Plaintiff's testimony before the Department of Agriculture is not itself protected conduct. Testimony provided at a hearing before the DOA is not testimony in a False Claims Act action. Further, there is no evidence from which the Court can draw a nexus between this DOA hearing and a potential False Claims Act action to be filed in the future. Thus, there is no evidence from which the Court can draw a nexus between Plaintiff's testifying at a hearing before the DOA and a potential False Claims action.[9] Also, Plaintiff admits that she never knew about the existence of the False Claims Act and never intended to initiate any False Claims Act action. There is no evidence that Plaintiff copied the documents to assist the government in any way. Plaintiff admits she copied the documents but had no planned use for the documents, "None whatsoever."

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[9] This is especially so under the facts of this case, where Plaintiff was compelled to testify before the DOA. To find that such is protected conduct under Section 3730 would in essence create a sort of quasi-witness immunity for employees who testify in any administrative hearing. Congress did not express such a purpose in enacting Section 3730(h).

In short, for any of these reasons alone, Plaintiff's conduct is not covered under Section 3730(h).

3. *Plaintiff's Cases Do Not Dispense with the Requirement of a Nexus Between Plaintiff's Conduct and a False Claims Act Action*

Plaintiff cites several cases holding that Section 3730(h) should be construed broadly. *Neal v. Honeywell*, 826 F.Supp. 266 (N.D.Ill.1993), *aff'd*, 33 F.3d 860 (7th Cir.1994); *Clemes v. Del Norte County Unified School Dist.*, 843 F.Supp. 583 (N.D.Cal.1994); *U.S. ex rel. Kent v. Aiello*, 836 F.Supp. 720 (E.D.Cal.1993). However, none of the cases has dispensed with the requirement that there be some relationship between the employee's conduct and the filing, or potential filing, of a False Claims Act action. In *Neal v. Honeywell*, 826 F.Supp. 266 (N.D.Ill.1993), *aff'd*, 33 F.3d 860 (7th Cir.1994), a False Claims Act settlement was reached before the action was filed. The plaintiff employee discovered that her employer was falsifying ballistics test data and delivering defective ammunition to the United States Army. *Id.* at 267. The plaintiff reported the conduct to her supervisors pursuant to Honeywell's internal reporting procedures. Honeywell notified the government and conducted an internal investigation. The results of the investigation were shared with the Army, and Honeywell reached a settlement agreement with the Army specifically under Section 3730(a) of the False Claims Act. *Id.*

The Seventh Circuit affirmed but questioned the district court's quick conclusion that even though the plaintiff could not prevail under the language of the statute,

the whistle-blower provision must be construed broadly. *Neal v. Honeywell*, 33 F.3d 860, 862 (7th Cir.1994). The Seventh Circuit characterized the enactment of the Section 3730(h) as a balancing of interests: the government's interest in obtaining information by relieving employees of fear, versus the employer's interest in managing its own labor force. *Id.* Noting that Congress made a choice to favor the former interest over the latter, the Seventh Circuit concluded that the question is not "which way the statute points but how far it directs one to go in that direction." *Id.* The Court continued that "after identifying the statute's accommodation of competing interests," no principle authorizes a court to give the favored party "a little more." *Id.*[10]

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[10] The Seventh Circuit also noted that Congress will strike this balance in many different ways in different situations. *Id.* at 863. Therefore, the Seventh Circuit implied that the district court's conclusion that all federal whistle-blower provisions should be construed broadly was pre-mature. The Court noted that there is no rule that all statutes addressing related topics mean the same thing, "let alone that all statutes should receive the reading most favorable to whistle-blowers." *Id.* To be sure, there is a long-standing principle that different language implies different meaning. *See Fogerty v. Fantasy*, ___ U.S. ___, 114 S.Ct. 1023, 127 L.Ed.2d 455 (1994) (rejecting the conclusion that all fee-shifting statutes should be treated as minor variations on 42 U.S.C. § 1988).

Notwithstanding its skepticism towards the district court's analysis, the Seventh Circuit affirmed the district court's opinion, finding that the plaintiff's actions were covered by the literal terms of the statute. *Neal*, 33 F.3d at 863-64. The Court noted that the language of the statute protects activity related to "an action filed, or to be filed . . . under this section." *Id.* at 863 (quoting 31 U.S.C. § 3730(h) (1994)). Focusing on the "to be filed" language, the Court noted that the plaintiff filed a

In any event, the *Neal* employee filed an internal complaint and the employer shared the results of that internal investigation with the government and settled with the government under Section 3730(a) of the False Claims Act. If anything, *Neal* supports Defendants' position here that Plaintiff's conduct is not covered by Section 3730(h) since Plaintiff admits she never intended to bring a False Claims Act action, never planned to use the documents she copied for anything, and only testified at a DOA hearing under a subpoena, *i.e.*, compulsory process.

Plaintiff also relies upon two California district court cases, *Clemes v. Del Norte County Unified School Dist.*, 843

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complaint which led to an internal inquiry, which in turn led to a federal inquiry. Before an action was filed, the Government and Honeywell reached a settlement agreement under Section 3730(a). *Id.*

In *Neal*, the question then became whether the "to be filed" language should be construed to provide protection for conduct which eventually resulted in an action being filed under Section 3730(h), or, rather, should the conduct be viewed objectively at the time it occurred. In other words, is the filing of a 3730(a) or (b) action a prerequisite to the filing of a 3730(h) action, or is the requirement merely that a 3730(a) or (b) action be distinctly possible at the time the employee engaged in his or her "protected" conduct. The Seventh Circuit decided that, considering the overall purpose of the statute, and the choice of words used in the statute, that Section 3730 should be interpreted to protect employee conduct occurring at a point when litigation was (or is) a distinct possibility. *Id.* at 864. *But see Casarez v. Delco Systems Operations*, No. 94-CV-6844-AWT, 1993 WL 169255 (C.D.Cal. Mar. 1, 1993) (holding that the filing of a *qui tam* action is an absolute prerequisite to the filing of a Section 3730(h) action).

F.Supp. 583 (N.D.Cal.1994) and *U.S. ex rel. Kent v. Aiello*, 836 F.Supp. 720 (E.D.Cal.1993). However, the employees' conduct in both cases was distinctly different from Plaintiff's here. In *Clemes*, the plaintiff complained to the county district attorney and the Department of Justice of false claims against the government. The plaintiff, thereafter, experienced reactions from the defendants that the plaintiff considered to be retaliation. The defendants filed a motion to dismiss, arguing that the filing of a *qui tam* action is a prerequisite to the filing of a 3730(h) action. The district court denied the defendants' motion, finding no support for such a proposition in the language of the statute. *Clemes*, 843 F.Supp. at 595-96. The Court reasoned that the statute expressly covers conduct in furtherance of a False Claims Act action, and contains no requirement that employees file a *qui tam* action or exhaust the procedural requirements of Section 3730(b). *Id.*[11]

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[11] *Clemes* is the only case Plaintiff cites that accorded an employee protection under Section 3730(h) where a Section 3730 action had not been filed or was not pending. *See Clemes v. Del Norte County Unified School Dist.*, 843 F.Supp. 583 (N.D.Cal.1994) (recognizing that no action had been filed or was pending). However, *Clemes* was decided in the context of a motion to dismiss. A motion to dismiss must be denied unless it is clear from the complaint and allegations that the plaintiff can prove no set of facts which would entitle the plaintiff to relief. *Conley v. Gibson*, 355 U.S. 41, 47, 78 S.Ct. 99, 102, 2 L.Ed.2d 80 (1957). All inferences that can be drawn from the allegations in the plaintiff's complaint are to be construed in favor of the plaintiff. *Retail Clerks Int'l Ass'n v. Schermerhorn*, 373 U.S. 746, 753 n. 6, 83 S.Ct. 1461, 1465 n. 6, 10 L.Ed.2d 678 (1963). The fact that the plaintiff's complaint in *Clemes* alleged that the plaintiff complained to the Department of Justice arguably creates an inference that the plaintiff sought to initiate a False Claims Act

In *Aiello,* the plaintiff-employee filed a *qui tam* action against the defendants, as well as a retaliatory discharge action under Section 3730(h). *Aiello,* 836 F.Supp. at 723. The plaintiff alleged that the defendants terminated her because of testimony that she gave before a grand jury. The plaintiff also alleged that she initiated a federal inquiry into the defendants' conduct. The defendants filed a motion to dismiss the plaintiff's Section 3730(h) claim, arguing that the plaintiff failed to allege that an action was "filed or to be filed" under Section 3730(b). The defendants also argued that Section 3730 does not protect employees who provide testimony to a grand jury. *Id.*

The district court denied the defendants' motion on two grounds. First, the district court noted that even though the plaintiff failed to allege that a Section 3730(b) action was "filed or to be filed," the defendants' argument must be rejected because the plaintiff had actually filed a *qui tam* action under Section 3730(b). *Id.* at 724. Second, after prophesying that Section 3730(h) does protect employees who provide testimony to a grand jury, the court determined that the plaintiff's allegation that she initiated a federal inquiry into the defendants' conduct was enough to invoke the protection of Section 3730(h). *Id.*[12]

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action. Accordingly, even in *Clemes,* Plaintiff can find no support for her proposition that she is protected by Section 3730(h) where her conduct bears no relationship to the potential filing of a False Claims Act action.

[12] Another decision interpreting the language of Section 3730(h) is *Rehman v. ECC Int'l Corp.,* No. 90-CV-425-ORL-22, 1993 WL 85758, 1993 U.S. Dist. LEXIS 20765 (M.D.Fla. Mar. 4,

Again, the plaintiff employees' conduct in these two California cases is distinctly different from Plaintiff's conduct in this case. In both cases, the California plaintiffs took affirmative steps to initiate a governmental inquiry, by contacting the district attorney and Department of Justice in *Clemes*, and by actually filing a *qui tam* action in *Aiello*. In contrast, Plaintiff copied the documents only because they were coming out of her office and admitted she had no use for the documents at that time. In fact, Plaintiff did nothing with these documents until she was subpoenaed by the DOA to produce them and testify four years later. The cases cited by Plaintiff do not support Section 3730(h) coverage for Plaintiff's conduct here.

C. *PLAINTIFF'S SECTION 1985(3) CLAIM*

Plaintiff also raises a claim under the Ku Klux Klan Act of 1871, 42 U.S.C. § 1985(3) (1994). Plaintiff complains that Defendants conspired to deprive her of the right to testify before the Department of Agriculture. Plaintiff alleges that Defendants conspired to retaliate against Plaintiff for testifying before the DOA, and that Defendants' decision to terminate Plaintiff was an act in furtherance of Defendants' conspiracy. Plaintiff complains

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1993). In *Rehman*, the defendant filed a motion for summary judgment on the plaintiff's Section 3730(h) claim, arguing that the plaintiff had not given the defendant any notice that the plaintiff was performing any actions pursuant to the Section 3730(b). The court denied the defendant's motion, reasoning that it would be anomalous "to protect such a broad range of conduct and also impose a strict requirement that prior notice be given of a qui tam claim." *Id.* at *2.

that she has suffered severe emotional distress due to Defendants' alleged conspiracy.

In order to state a claim under Section 1985(3), a plaintiff must show that she is a victim of some racial or perhaps other class-based discrimination as follows:

> (1) A conspiracy;
>
> (2) for the purpose of depriving, either directly or indirectly, any person or class of persons of equal protection of the laws, or of equal privileges and immunities under the laws;
>
> (3) an act in furtherance of the conspiracy;
>
> (4) whereby a person is either injured in his person or property or deprived of any right or privilege of a citizen of the United States.

Lucero v. Operation Rescue of Birmingham, 954 F.2d 624 (11th Cir.1992). Defendants contend that Plaintiff is not entitled to relief under Section 1985(3) because she can not make an adequate showing under the second element outlined above. More specifically, Defendants argue that Plaintiff is not a member of a protected class for the purposes of Section 1985(3). Plaintiff counters that "whistle-blowers" should be a protected class for the purposes of Section 1985(3).

Under Section 1985(3), Plaintiff must show that she was the victim "of some racial, or perhaps otherwise class-based, invidiously discriminatory animus. . . . " *Burrell v. Board of Trustees of Ga. Military College*, 970 F.2d 785, 794 (11th Cir.1992); *Lucero*, 954 F.2d at 628 (quoting *Griffin v. Breckenridge*, 403 U.S. 88, 91 S.Ct. 1790, 29 L.Ed.2d 338 (1971)). In support of her position that whistle-blowers are a protected class, Plaintiff relies primarily

on *Lapin v. Taylor*, 475 F.Supp. 446 (D.Haw.1979), which expressly extended Section 1985(3) coverage to whistle-blowers. However, a number of circuit courts have held Section 1985(3) does not apply to whistle-blowers and have expressly rejected the *Lapin* decision. *See Garrie v. James L. Gray, Inc.*, 912 F.2d 808 (5th Cir.1990), *cert. denied*, 499 U.S. 907, 111 S.Ct. 1108, 113 L.Ed.2d 218 (1991) (expressly rejecting *Lapin*); *Deubert v. Gulf Federal Savings Bank*, 820 F.2d 754 (5th Cir.1987) (rejecting attempt to transform Section 1985(3) into general "whistle-blower" statute); *Buschi v. Kirven*, 775 F.2d 1240 (4th Cir.1985) (rejecting *Lapin*); *Hicks v. Resolution Trust Corp.*, 767 F.Supp. 167 (N.D.Ill.1991), *aff'd*, 970 F.2d 378 (7th Cir.1992) (rejecting *Lapin*); *Pope v. Bond*, 641 F.Supp. 489 (D.D.C.1986) (rejecting *Lapin*).

Plaintiff also directs the Court to a number of cases decided in other circuits where courts have extended Section 1985(3) protection into non-racial contexts.[13]

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[13] *See Means v. Wilson*, 522 F.2d 833 (8th Cir.1975), *cert. denied*, 424 U.S. 958, 96 S.Ct. 1436, 47 L.Ed.2d 364 (1976) (Indian supporters of a political candidate); *Weise v. Syracuse University*, 522 F.2d 397 (2d Cir.1975) (female faculty members); *Glasson v. City of Louisville*, 518 F.2d 899 (6th Cir.), *cert. denied*, 423 U.S. 930, 96 S.Ct. 280, 46 L.Ed.2d 258 (1975) (supporters of a political candidate); *Smith v. Cherry*, 489 F.2d 1098 (7th Cir.1973), *cert. denied*, 417 U.S. 910, 94 S.Ct. 2607, 41 L.Ed.2d 214 (1974) (voters who were deceived as to the actual result of their vote); *Marlowe v. Fisher Body*, 489 F.2d 1057 (6th Cir.1973) (employees of Jewish faith); *Cameron v. Brock*, 473 F.2d 608 (6th Cir.1973) (supporters of political candidate); *Azar v. Conley*, 456 F.2d 1382 (6th Cir.1972) (middle-class white family); *Action v. Gannon*, 450 F.2d 1227 (8th Cir.1971) (members of a predominantly white Catholic parish); *Richardson v. Miller*, 446 F.2d 1247 (3d Cir.1971) (persons who advocated racial equality in employment opportunities); *Harrison v. Brooks*, 446 F.2d 404 (1st Cir.1971) (married couple).

However, none of these cases are from the Eleventh Circuit, where for over 120 years Section 1985(3) has not yet been extended beyond a racial class. The Eleventh Circuit recently rejected an attempt to apply the Ku Klux Klan Act to activities of abortion clinic protesters. *Lucero v. Operation Rescue of Birmingham*, 954 F.2d 624 (11th Cir.1992). In *Burrell v. Board of Trustees of Ga. Military College*, 970 F.2d 785 (11th Cir.1992), the Eleventh Circuit held that the plaintiff could not sue under Section 1985(3), pointing out that a claim under section 1985(3) must allege a "class-based, invidiously discriminatory purpose behind the defendant's action" and "[t]his narrow intent requirement erects a significant hurdle for Section 1985(3) plaintiffs." *Id.* at 794. In *Faucher v. Rodziewicz*, 891 F.2d 864 (11th Cir.1990), the Eleventh Circuit specifically reserved the question whether Section 1985(3) does or does not apply to gender-based discrimination for another day. *Id.* at 871 n. 4.

The Supreme Court recently reviewed again the issue whether Section 1985(3) applies in non-racial contexts. *See Bray v. Alexandria Women's Health Clinic*, ___ U.S. ___, 113 S.Ct. 753, 122 L.Ed.2d 34 (1993) (holding that women seeking an abortion is not a protected class under Section 1985(3)). In *Bray*, the Supreme Court noted that whatever the precise meaning of "class" may be beyond race, it "unquestionably connotes something more than a group of individuals who share a desire to engage in conduct that the [Section] 1985(3) defendant disfavors." *Id.* at ___, 113 S.Ct. at 759. The Eleventh Circuit has not revisited the issue of the scope of Section 1985(3)'s protection since *Bray*.

Even assuming Section 1985(3) can be applied in some non-racial contexts, this Court finds that Plaintiff, as an alleged whistle-blower, is not a victim of some "otherwise class-based invidiously discriminatory animus." The Court finds that "whistle-blowers" instead merely fall within Bray's "group of individuals who share a desire to engage in conduct the Section 1985(3) defendant disfavors."[14] The Court grants Defendants' Motion

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[14] In *Kimble v. D.J. McDuffy, Inc.*, 648 F.2d 340 (5th Cir.), *cert. denied*, 454 U.S. 1110, 102 S.Ct. 687, 70 L.Ed.2d 651 (1981), the Fifth Circuit quoted from *Griffin v. Breckenridge*, 403 U.S. 88, 91 S.Ct. 1790, 29 L.Ed.2d 338 (1971), and required that Section 1985(3) plaintiffs show that they were victims of some "racial, or perhaps otherwise, class-based invidiously discriminatory animus." *Kimble*, 648 F.2d at 345 (quoting *Griffin*, 403 U.S. at 101-02, 91 S.Ct. at 1797-98). The Fifth Circuit noted that "actions brought under Section 1985 must be carefully delineated in accordance with the general purposes of the Act in order to avoid the unintended creation of a general federal tort law." *Id.* at 346. Guided by this admonition, the Fifth Circuit held that a class of plaintiffs alleging that oil industry employers discriminated against the plaintiffs because the plaintiffs had filed personal injury complaints and workers' compensation claims against other employers in the oil industry did not have actionable claims under Section 1985(3). The Fifth Circuit reasoned that a "class" of persons who filed personal injury lawsuits or workers' compensation claims is neither a "class based on political beliefs or associations (the kind of class envisioned by the framers of the Ku Klux Klan Act), nor a class 'having common characteristics of an inherent nature.' " *Id.* at 347 (quoting *Kimble v. D.J. McDuffy, Inc.*, 445 F.Supp. 269, 273 (E.D.La.1978)). According to the Fifth Circuit, the logic of *Griffin* would be lost if the "class" of people allegedly victimized by the defendants' allegedly tortious conduct was considered to be a

for Summary Judgment on Plaintiff's Section 1985(3) claim.

D. *PLAINTIFF'S STATE LAW CLAIM*

Plaintiff's only remaining claim against Defendants is a state law claim. The Court *sua sponte* may raise a jurisdictional defect at any time. *Barnett v. Bailey*, 956 F.2d 1036, 1039 (11th Cir.1992); *Fitzgerald v. Seaboard System R.R., Inc.*, 760 F.2d 1249, 1251 (11th Cir.1985). The Court, *sua sponte*, will examine whether it continues to have jurisdiction over this action.

Since Plaintiff is a Georgia domiciliary and Defendant UAP is a Georgia corporation, complete diversity does not exist. *Strawbridge v. Curtiss*, 7 U.S. (3 Cranch) 267, 2 L.Ed. 435 (1806). Thus, there is no basis for original federal jurisdiction over Plaintiff's state law claim against Defendants. The state law claim previously was before the court properly as a supplemental claim supported by Plaintiff's federal question claims. *See* 28 U.S.C. § 1367(a) (1994). However, with the dismissal of Plaintiff's False Claims Act and Ku Klux Klan Act claims, there remains

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sufficient class under Section 1985(3) merely by virtue of their common complaint. *Id.*

The reasoning of the Fifth Circuit in *Kimble* applies with as equal a force to whistle-blowers as it does to employees who file personal injury suits or workers' compensation claims. If plaintiffs can state claims under Section 1985(3) merely by virtue of their whistle-blower status, Section 1985(3) would become a general whistle-blower protection act. Clearly, this was not the intent of the Congress that enacted the Ku Klux Klan Act.

no independent original federal jurisdiction to support the Court's exercise of supplemental jurisdiction over the state claim against Defendants UAP and ConAgra.

The Court must now inquire into whether a jurisdictional basis exists to support this state law claim in federal court. The Court's inquiry is twofold. First, the Court must decide whether it has the power to hear the state law claim. Second, if the Court does have the power to hear the state claim, the Court must decide whether, in its discretion, it will retain jurisdiction over the state claim. *United Mine Workers v. Gibbs*, 383 U.S. 715, 725-26, 86 S.Ct. 1130, 1138-39, 16 L.Ed.2d 218 (1966).

The question of whether subject matter jurisdiction exists is measured as of the time the Complaint was filed. *In re Carter*, 618 F.2d 1093 (5th Cir.1980). When Plaintiff filed this Complaint, Plaintiff was a Georgia domiciliary and Defendant UAP was a Georgia corporation. When Plaintiff filed her Complaint, Plaintiff had a federal question claim against Defendants UAP and ConAgra and Plaintiff's state law claim against those two defendants were a proper exercise of the Court's supplemental jurisdiction. *See* 28 U.S.C. § 1367(a) (1994); *see also Palmer v. Hospital Authority of Randolph County*, 22 F.3d 1559, 1567 (11th Cir.1994). The dismissal of Plaintiff's underlying False Claims Act and Ku Klux Klan Act claims does not deprive the Court of supplemental jurisdiction over the remaining state law claim. *See Palmer*, 22 F.3d at 1568; *Edwards v. Okaloosa County*, 5 F.3d 1431, 1433-35 (11th Cir.1993). Indeed, under 28 U.S.C. § 1367(c), the Court has the discretion to decline to exercise supplemental jurisdiction over a non-diverse state law claim, where the Court has dismissed all claims over which it had original

jurisdiction, but is not required to dismiss the case. *See Palmer*, 22 F.3d at 1567-68.

As the Eleventh Circuit made clear in *Palmer*, once a court decides that it has power to exercise supplemental jurisdiction under Section 1367(a), then the court should exercise that jurisdiction, unless Section 1367(b) or (c) applies to limit the exercise.[15] In this case, Section 1367(c) applies because the Court "has dismissed all claims over which it has original jurisdiction;" namely, Plaintiff's False Claims Act and Ku Klux Klan Act claims against Defendants UAP and ConAgra. *See* 28 U.S.C. § 1367(c) (1994). While 28 U.S.C. § 1367(c) permits a court to dismiss any state law claims where the court has dismissed all the claims over which it had original jurisdiction, the court can also consider other factors. Where Section 1367(c) applies, considerations of judicial economy, convenience, fairness, and comity may influence the court's discretion to exercise supplemental jurisdiction. *See Palmer*, 22 F.3d at 1569; *Executive Software N. Am. v. United States Dist. Court*, 15 F.3d 1484, 1493 (9th Cir.1994); *Fallin v. Mindis Metals, Inc.*, 865 F.Supp. 834, 841 (N.D.Ga.1994).

Defendants filed a Motion for Summary Judgment on Plaintiff's state law intentional infliction of emotional distress claim. Resolution of this claim depends on determinations of state law. State courts, not federal courts,

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[15] 28 U.S.C. § 1367 codifies the traditional concepts of ancillary and pendent jurisdiction under the name supplemental jurisdiction. Simply explained, Section 1367(a) grants the federal judiciary congressional approval to extend supplemental jurisdiction to the limits of the Constitution. Section 1367(b) and (c) reduce that grant.

should be the final arbiters of state law. *Hardy v. Birmingham Bd. of Educ.*, 954 F.2d 1546, 1553 (11th Cir.1992). When coupled with the Court's discretion to exercise supplemental jurisdiction under Section 1367(c), this Court finds that the state law claim remaining in this action is best resolved by the Georgia courts. This is especially true here where Plaintiff seeks belatedly to raise additional state law claims in the proposed amended complaint discussed below. The Court finds that judicial economy, fairness, and convenience dictate having these state law claims decided by state courts.

E. *PLAINTIFF'S MOTION FOR LEAVE TO AMEND COMPLAINT*

On January 12, 1995, Plaintiff filed a Motion for Leave to File Amended Complaint [22-1], along with a proposed amended complaint. Plaintiff sought to add a third defendant and two additional state law claims to her original Complaint. On February 16, 1995, Plaintiff filed a Revised Motion for Leave to File Amended Complaint [28-1], along with an additional amended complaint. Plaintiff's Revised Motion for Leave to File Amended Complaint noted that Plaintiff was filing the revised amended complaint to correct a spelling error contained in the original amended complaint, and to add a fourth defendant. However, Plaintiff never expressly withdrew her original Motion. Accordingly, the Court will consider them both.

In light of the Court's above ruling on Defendants' Motion for Summary Judgment on Plaintiff's federal claims, the Court denies Plaintiff's Motion for Leave to

File Amended Complaint and also denies Plaintiff's Revised Motion for Leave to File Amended Complaint. Plaintiff's proposed amended complaints add two state law claims and two new defendants. The Court denies Plaintiff's Motions with respect to the adding of two state law claims for the reasons outlined above concerning supplemental jurisdiction.

The Court also denies Plaintiff's Motions with respect to the adding of two new defendants. Since the Court has determined that Plaintiff's current federal law claims are without merit, and Plaintiff asserts no new federal claims against these two proposed additional defendants, the only claims Plaintiff can maintain against the proposed defendants are state law claims. For the reasons discussed above, the Court declines to exercise jurisdiction over Plaintiff's various state law claims against these four Defendants. Accordingly, Plaintiff's Motion for Leave to File Amended Complaint and Plaintiff's Revised Motion for Leave to File Amended Complaint are denied.

F. *DEFENDANT CONAGRA'S MOTION FOR SUMMARY JUDGMENT*

On September 15, 1994, Defendant ConAgra filed a Motion for Summary Judgment [13-1], arguing that even if Plaintiff's allegations were true, that Plaintiff was not an employee of Defendant ConAgra and that Defendant ConAgra did not threaten Plaintiff about testifying before the DOA or play any role in the decision to terminate

Plaintiff. Since the Court is granting Defendant ConAgra's second Motion for Summary Judgment on Plaintiff's federal law claims, the Court does not reach the issues in Defendant ConAgra's first Motion for Summary Judgment on Plaintiff's federal law claims. Additionally, since the Court declines to exercise supplemental jurisdiction over Plaintiff's state law claims, the Court denies Defendant ConAgra's Motion for Summary Judgment on Plaintiff's state law claims, as moot.

III. *CONCLUSION*

The Court GRANTS Plaintiff's Motion to File Response Brief [41-1]. The Court GRANTS Defendants' second Motion for Summary Judgment [32-1] on Plaintiff's False Claims Act and Ku Klux Klan Act claims. The Court DENIES Defendants' Motion for Summary Judgment [32-1] on Plaintiff's state law claim, as MOOT, and DISMISSES Plaintiff's state law claim, without prejudice. Defendant ConAgra's Motion for Summary Judgment [13-1] is MOOT.

The Court DENIES Plaintiff's Motion to for Leave to File Amended Complaint [22-1]. The Court DENIES Defendants' Motion to Amend Answers [23-1], as MOOT. The Court DENIES Plaintiff's Revised Motion for Leave to File Amended Complaint [28-1]. The Court DENIES Plaintiff's Motion to Extend Time for Discovery [26-1], as MOOT.

The Court directs the Clerk to enter final judgment in favor of Defendants on Plaintiff's federal claims under the False Claims Act and the Ku Klux Klan Act and final

judgment dismissing Plaintiff's state law claim, without prejudice.

It is SO ORDERED.

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 95-8871

DENISE CHILDREE,

Plaintiff-Appellant,

versus

UAP/GA AG CHEM, INC., et al,

Defendants-Appellees.

On Appeal from the United States District Court for the Northern District of Georgia

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(Filed Oct. 25, 1996)

BEFORE: CARNES, Circuit Judge, FAY and GIBSON*, Senior Circuit Judges.

PER CURIAM:

The petition(s) for rehearing filed by appellees UAP/GA AG CHEM, INC., et al, is DENIED.

ENTERED FOR THE COURT:

/s/ Edward E. Carnes
UNITED STATES CIRCUIT JUDGE

ORD-41

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* Honorable John R. Gibson, Senior U.S. Circuit Judge for the Eighth Circuit sitting by designation.

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 95-8871

DENISE CHILDREE,

Plaintiff-Appellant,

versus

UAP/GA AG CHEM, INC., et al,

Defendants-Appellees.

On Appeal from the United States District Court for the Northern District of Georgia

---

(Filed Oct. 25, 1996)

ON PETITION(S) FOR REHEARING AND SUGGESTION(S) OF REHEARING EN BANC (Opinion ___, 11th Cir., 19___, ___ F.2d ___).

Before: CARNES, Circuit Judge, FAY and GIBSON*, Senior Circuit Judges.

PER CURIAM:

The Petition(s) for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate

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* Honorable John R. Gibson, Senior U.S. Circuit Judge for the Eighth Circuit, sitting by designation.

Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

/s/ Edward E. Carnes
UNITED STATES CIRCUIT JUDGE

ORD-42
(6/95)

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 95-8871

DENISE CHILDREE,

Plaintiff-Appellant,

versus

UAP/GA AG CHEM, INC., et al,

Defendants-Appellees.

Appeal from the United States District
Court for the Northern District of Georgia

(Filed Nov. 6, 1996)

ORDER:

( ) The motion of UAP/GA AG CHEM, INC., ETAL for (X) stay ( ) recall and stay of the issuance of the mandate pending petition for writ of certiorari is DENIED.

(✓) The motion of UAP/CA CHEM, INC., ETAL for (xx) stay ( ) recall and stay of the issuance of the mandate pending petition for writ of certiorari is GRANTED to and including December 2, 1996, the stay to continue in force until the final disposition of the case by the Supreme Court, provided that within the period above mentioned there shall be filed with the Clerk of this Court the certificate of the Clerk of the Supreme Court that the certiorari petition has been filed. The Clerk shall issue the mandate upon the filing of a copy of an order of the Supreme Court denying the writ, or upon expiration of the stay

granted herein, unless the above mentioned certificate shall be filed with the Clerk of this Court within that time.

( ) The motion of ___ for a further stay of the issuance of the mandate is GRANTED to and including ___, under the same conditions as set forth in the preceding paragraph.

( ) IT IS ORDERED that the motion of ___ for a further stay of the issuance of the mandate is DENIED.

/s/ Edward E. Carnes
UNITED STATES CIRCUIT JUDGE

§ 3730. Civil actions for false claims

* * *

(h) Any employee who is discharged, demoted, suspended, threatened, harassed, or in any other manner discriminated against in the terms and conditions of employment by his or her employer because of lawful acts done by the employee on behalf of the employee or others in furtherance of an action under this section, including investigation for, initiation of, testimony for, or assistance in an action filed or to be filed under this section, shall be entitled to all relief necessary to make the employee whole. Such relief shall include reinstatement with the same seniority status such employee would have had but for the discrimination, 2 times the amount of back pay, interest on the back pay, and compensation for any special damages sustained as a result of the discrimination, including litigation costs and reasonable attorneys' fees. An employee may bring an action in the appropriate district court of the United States for the relief provided in this subsection.

31 U.S.C. § 3730(h).

Supreme Court, U.S.
FILED
JAN 24 1997
CLERK

No. 96-841

In The

Supreme Court of the United States

October Term, 1996

UAP/GA AG CHEM., INC. and CONAGRA, INC.,

Petitioners,

vs.

DENISE CHILDREE,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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STATEMENT OF THE CASE

The opinion of the court of appeals correctly sets forth the facts and procedural history of this case. In the interest of making this brief concise, Respondent respectfully directs the Court's attention to the appellate court's opinion.

Pursuant to United States Supreme Court Rule 15.1, Respondent brings the following misstatements of facts contained in the petition to the Court's attention.

Petitioner misrepresents to this Court the circumstances surrounding Childree's copying documents concerning the fraudulent rebilling and taking these copies home. Petitioner states that the Department of Agriculture administrative hearing was where UAP/GA first discovered that Childree had copied the documents and taken them home. (Petition at 2). Childree contends that her supervisor, Darryl Mathis, was aware at the time she copied the documents and took them home that she was doing so. Based on this supervisor's knowledge of these actions at the time, Childree did not "surreptitiously" copy the documents as Petitioner alleges. (Petition at 4).

Petitioner also incorrectly states Childree's reasons for copying the documents. Petitioner asserts that Childree never planned to do anything with these documents and provided no justification for copying them and taking them home. (Petition at 4-5). While Childree readily admits that she did not plan to use these documents to file a *qui tam* action under the False Claims Act, Petitioner's statement that she did not plan to do anything with them is not entirely accurate. Childree copied these documents as proof of her suspicion of false claims which she had discussed with the ASCS official. Since these documents were represented as coming from her office, Childree felt she should have these copies to prove that she was not involved in their submission.

Finally, Petitioner misleads this Court as to Childree's conduct in furtherance of a False Claims Act suit. Petitioner states that it is undisputed Childree never assisted the government or anyone else who filed, threatened to file, or even considered filing a False Claims Act suit. (Petition at 5). Childree contends, however, that at the time she assisted the government in its investigation, she had no way of knowing whether the government would file a False Claims Act suit and no way to ensure this subsequent action.

REASONS FOR DENYING THE WRIT

The decision of the court of appeals is correct and does not merit further review. The decision does not conflict with any decision of this Court or any federal court. Case law is clear that a False Claims Act (FCA) suit does not need to actually be filed in order to trigger protection for employees who help investigate fraud against the government.

I.

IN HOLDING THAT RESPONDENT WAS PROTECTED BY § 3730(h), THE ELEVENTH CIRCUIT CORRECTLY RELIED UPON THE CLEAR NEXUS WHICH EXISTS BETWEEN RESPONDENT'S CONDUCT AND THE FURTHERANCE OF A POTENTIAL FALSE CLAIMS ACT SUIT.

Petitioner incorrectly asserts that the decision of the court below expands the anti-retaliation provision of the False Claims Act to protect plaintiffs who have no palpable nexus to the statute. There is, however, a clear nexus in this case between the employee's conduct and the furtherance of a potential False Claims Act suit. The court below plainly relied on this nexus.

In 1989, Respondent conveyed evidence of possible fraud to a United States Department of Agriculture (USDA) official. This cooperation with the USDA led to her testimony in 1993 at a USDA administrative hearing. It is clear that her cooperation with the USDA administrative process is a protected activity under the whistleblower provision of the False Claims Act, 31 U.S.C. § 3730(h). Her production of evidence and testimony furthered an investigation that could have potentially resulted in a False Claims Act suit by the government. The fact that the government did not pursue this possible action does not remove Respondent's whistleblower protection under § 3730(h). *Neal v. Honeywell, Inc.*, 33 F.3d 860, 864-65 (7th Cir. 1994); *Robertson v. Bell Helicopter Textron, Inc.*, 32 F.3d 948, 951 (5th Cir. 1994), *cert. denied*, 115 S. Ct. 1110 (1995); *Clemes v. Del Norte County Unified Sch. Dist.*, 843 F. Supp. 583, 595-96 (N.D. Cal. 1994).

The phrase in § 3730(h), "an action filed or to be filed under this section," means that the section's retaliation protections apply to both a *qui tam* action brought by the employee and to a government action under § 3730(a). Few employees are aware of their ability to bring *qui tam* actions under this statute. Many employees will, however, engage in conduct in cooperation with a government fraud investigation. The protection provided to this latter group of employees must not be overlooked.

An employee's lack of specific intent to assist or further an actual FCA action is irrelevant. An employee who reports her concerns regarding potential false claims squarely fits within § 3730(h), regardless of the employee's enthusiasm or motivation. While the report may be at the employee's initiative, it also may be, under the statute, in response to questions posed by a government official or in response to a subpoena. Protection is provided for any lawful acts on behalf of the employee which would further an action "to be filed," regardless of the

employee's specific intent. As the court below correctly noted, "nothing in the language of § 3730 suggests that its protections are limited to those who were motivated by it." *Childree v. UAP/GA AG CHEM, Inc. and Conagra, Inc.*, 92 F.3d 1140, 1146 (11th Cir. 1996). The court found that the statute contained no knowledge requirement and declined to read one into it. *Id.*

Protection under the statute must be provided if an action, *qui tam* or by the government, was a possibility at the time the employee's lawful acts took place. *Neal*, 33 F.3d at 864. An employee is protected from retaliation "because of" any conduct which objectively falls within the realm of "lawful acts on behalf of the employee or others in furtherance of an action . . . to be filed." *Id.* An employee does not have to be aware of an actual suit at the time of her provision of evidence of fraud in order to be afforded protection from retaliation under the statute.

The statute identifies as protected acts "investigation for initiation of, testimony for, or assistance in an action. . . ." 31 U.S.C. § 3730(h). Clearly, an employee, such as Respondent, who conducts an investigation for initiation of a government action would be protected. Any employee's conduct in furtherance of a False Claims Act suit should be protected. All that is necessary to trigger such protection is lawful conduct that furthers an action that has been filed or is to be filed at some future date.

The government's action with regard to the evidence of fraud provided by the employee does not determine whether § 3730(h) protection is applicable. The employee often cannot appraise the importance of the fraudulent conduct or provide legal analysis of the evidence acquired. Government prosecution may be ill-advised due to cost or the favorability of settlement. Whistleblower protection for the employee cannot be conditioned upon such outcomes.

The correct approach to the "to be filed" language of § 3730(h) is provided by *Neal v. Honeywell, Inc.*, 33 F.3d 860, 864 (7th Cir. 1994), which calls for the application of the statute "according to how things stood at the time of the [protected] activity." Such an application avoids the problem of having the issue of employee protection decided by subsequent government action over which the employee has no control.

The decision of the court below is correct in not conditioning § 3730(h) employee protection on this subsequent government action. Rejecting a retrospective test, the court below joined the Seventh Circuit in holding that "§ 3730(h) protection is available not only where a false claims action is actually filed, but also where the filing of such an action, by either the employee or the government, was a 'distinct possibility' at the time the assistance was rendered." *Childree v. UAP/GA AG CHEM, Inc. and Conagra, Inc.*, 92 F.3d 1140, 1146 (11th Cir. 1996). The panel found that in light of Respondent's providing the USDA with information regarding fraudulent claims coupled with a USDA administrative finding of falsified documents and false leases, a § 3730(a) action was a distinct possibility at the time Respondent rendered her assistance. *Id.*

II.

THE ELEVENTH CIRCUIT DECISION DOES NOT CONFLICT WITH ANY DECISION OF THIS COURT OR ANY FEDERAL COURT.

Petitioner relies heavily on two court of appeal decisions to allege a conflict among the circuits regarding the extent of whistleblower protection. Respondent asserts, however, that, even after the publication of these decisions, the court below would reach the same decision without conflict.

The first case relied upon by Petitioner is *United States v. Century Healthcare Corp.*, 90 F.3d 1514 (10th Cir. 1996). Petitioner contends that the decision of the court below is contrary to the Tenth Circuit's holding in *Century* that "the plaintiff has the burden of pleading facts which would demonstrate that defendants had been put on notice that plaintiff was either taking action in furtherance of a private *qui tam* action or assisting in an FCA action brought by the government." *Id.* at 1522.

The *Century* court noted that "the case law is clear that a retaliation claim can be maintained even if no FCA action is ultimately successful or even filed." *Id.* The key, according to the *Century* decision, is that the defendant must have been put on notice of the employee's engaging in "protected activity," that is taking some type of action regarding a potential FCA action. *Id.*

The Tenth Circuit decision is not inconsistent with the decision of the court below. The *Century* plaintiff's job responsibility was to monitor compliance with applicable medicaid requirements. *Id.* at 1517. As part of her job duties, she reported instances of noncompliance to her superiors. A subsequent government investigation which revealed deficiencies similar to those discovered by the plaintiff was simply a routine audit and was completely independent of plaintiff's intracorporate complaints. *Id.* The court, therefore, found that, since she had given no suggestion that she was going to report the noncompliance to government officials, the employee had not given sufficient notice of a potential § 3730 action. *Id.* at 1523.

Unlike the plaintiff in *Century*, Respondent, whose job was to handle billing, gave her employer ample notice of her conduct "in furtherance" of a § 3730 action. One month after reporting

her concerns of false claims to her supervisors, Respondent met, along with one of her supervisors, with a government official to whom she reported her concerns of false claims. This same supervisor was aware that Respondent then copied documents relating to these false claims as proof of her testimony and took them home. At that point, Respondent placed her employer on notice that a FCA action was a "distinct possibility." Moreover, as soon as Respondent received a subpoena to testify at the government administrative hearing, her employer was again placed upon notice of the "distinct possibility" of a FCA action and of Respondent's testimony in furtherance thereof.

The court below was not faced with the situation addressed in *Century*. Respondent placed her employer on notice of her conduct in furtherance of a possible § 3730 action by the government rather than merely warning them of the consequences of their conduct. Once placed on notice of an employee's lawful cooperation with the government in investigating false claims, an employer's retaliation against the employee based on this cooperation is unlawful. *Id.* at 1522. The finding of § 3730(h) protection for Respondent by the court below, therefore, is not inconsistent with the *Century* decision.

The second court of appeals case relied upon by Petitioner is *United States v. Anton*, 91 F.3d 1261 (9th Cir. 1996). Again, this decision is not inconsistent with the holding of the court below. In *Anton*, the Ninth Circuit held that the plaintiff failed to establish a claim under § 3730(h) since the record clearly showed that she was not investigating false claims on the part of her employer but was merely attempting to get her employer to follow state and federal regulations. *Id.* at 1269. The court noted that "correcting regulatory problems may be a laudable goal, but one not actionable under the FCA in the absence of actual fraudulent conduct." *Id.* The court found that the employee "was not whistleblowing as envisioned in the paradigm qui tam FCA action." *Id.*

As did the court below, the *Anton* court held that "specific awareness of the FCA is not required." *Id.* at 1269. The Ninth Circuit decision seems harmonious with that of the court below in that the plaintiff must simply "be investigating matters which are calculated, or reasonably could lead, to a viable FCA action." *Id.* (citing *Neal v. Honeywell, Inc.*, 33 F.3d 860, 864 (7th Cir. 1994) and *Robertson v. Bell Helicopter Textron*, 32 F.3d 948, 950-52 (5th Cir. 1994), *cert. denied*, 115 S. Ct. 1110 (1995). Respondent's actions in cooperating with the USDA in investigating false claims clearly could have reasonably led to a viable FCA action. The holding of the court below is not, therefore, inconsistent with the *Anton* decision.

Given the clear nexus between Respondent's cooperation with government officials and a potential False Claims Act suit, along with the absence of any conflicting federal decision, further review of this case is unmerited.

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted,

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